IN THE SUPREME COURT OF FLORIDA

CHARLES D. DONALDSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO. 88,205

INITIAL BRIEF OF APPELLANT

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CHARLES D. DONALDSON,

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INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is the direct appeal of two convictions of first-degree murder and two death sentences, as well as related convictions and sentences. The Record on Appeal consists of thirty (30) volumes: volumes one (1) through twenty-one (21) contain the record, and volumes twenty-two (22) through thirty (30) contain the transcript. References to the record shall be made as "V#R#" and references to the transcript shall be made as "V#T#".

STATEMENT OF THE CASE

The State indicted Donaldson on July 28, 1994, for conduct alleged to have occurred July 9-10, 1994, in Okaloosa County. Count I charged premeditated/felony murder of Donnta Lamar Head. Count II charged premeditated/felony murder of Lawanda Latisha Campbell. Count III charged armed kidnapping of Donnta Lamar Head. Count IV charged armed kidnapping of Lawanda Latisha Campbell. Count V charged aggravated child abuse of Donnta Lamar Head, 15. Count VI charged aggravated child abuse of Lawanda

Latisha Campbell, 14.[1] V1R14-18.

A jury trial began April 8, 1996, before the Hon. G. Robert Barron, First Judicial Circuit Court. V22T22. On April 13, the jury found Donaldson guilty as charged, V13R2528-33, V27T1194-98, and the court adjudicated him, V30T1651-52. The penalty phase began April 25, V28T1203, and concluded April 26 when the jury voted 8-4 for death as to Head and 9-3 for death as to Campbell. V14R2679, V30T1724. A sentencing hearing before the judge took place on May 22, 1996. V15R2949-V16R3003.

The judge imposed sentence May 28, sentencing Donaldson to death on Counts I and II; life on Counts III and IV; and thirty (30) years' imprisonment on Counts V and VI. V16R3004-19. The court entered written reasons, V14R2750-58, V14R2789-97,[2] and a written judgment and sentence, V14R2725-49, V14R2765-88. Donaldson timely filed a notice of appeal. V14R2798. The court then twice amended its written judgment and sentence, first on June 26, 1996, nunc pro tunc May 28, 1996, V15R2815-36, and again on July 16, 1996, nunc pro tunc May 28, 1996, V15R2837-61, but no substantive change is apparent.

STATEMENT OF THE FACTS

This case involves the gunshot murder of two young criminals committed by triggerman Joseph Sykosky, who was tried separately and sentenced to life imprisonment. In this case, the State

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[1] Campbell actually was 13 years old at the time of her death. V25T713.

[2] A copy of the sentencing order is appended to this brief as A1-9.

accused Donaldson of being a small time street-level drug dealer who ordered Sykosky to kill the victims because they tried to rob Donaldson and posed a threat to him and his business. The major players were Donaldson, Joseph Sykosky, Ruben Cisneros, Joseph Wengert, and William Purcell Straham.[3] Wengert described himself as a prep cook and dishwasher at a restaurant, and as Donaldson's bodyguard and driver. Donaldson and Cisneros were engaged in the crack cocaine business. Straham was Donaldson's friend and occasionally drove him around. V24T434, V24T436, V24T448, V24T566-67, V26T827-29, V26T847-50. Sykosky was a frequent crack user who bought drugs from Donaldson. V24T443-44, V24T588-90, V24T496, V25T613, V26T853.

Uncontested evidence established that all five were present in Donaldson's house at 29A Cape Drive in Fort Walton Beach on the night of Saturday, July 9, 1994, when Sykosky murdered the two victims with multiple gunshots. The primary issues contested were whether, and to what extent, Donaldson participated, and whether the punishment is lawful and appropriate in light of the lesser punishment meted out to the other participants. Of these five, only Wengert and Straham testified in this trial. Wengert was charged with two counts of murder, V24T495, but on November 3, 1994, he cut a deal for a probation sentence in exchange for pleading no contest to two counts of accessory after the fact, third-degree felonies, conditioned on his providing truthful

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[3] Various witnesses use nicknames to refer to these individuals throughout the trial. Donaldson was often referred to as "C[ash]-Money," Sykosky as "Joe," Cisneros as "Little Man," Wengert at "Joey," and Straham as "Purc."

testimony against Donaldson, after which he would be sentenced with a possible withheld adjudication. V24T430, V24T517-20, V24T599-V25T603, V25T621-23, St. Ex. 13. He was released on a recognizance bond, V24T522, and has been on community control since then. While on community control he allegedly committed grand theft, but he got that charge reduced as well. V24T430-31, V24T522-23, V24T594-95, V25T603-05, V25T626-30. Straham was not charged despite some evidence of his participation.

A. Guilt Phase

The State's theory was that a series of events, in which Donaldson had been the intended victim of attempted robberies, assaults, and burglaries, precipitated the fatal episode. One incident occurred at the Marina Bay Motel three or four days before the murders. V24T442, V27T1026. Donaldson, Wengert, and Cisneros were in the hotel where they had adjoining rooms, one for conducting crack cocaine business and another for "females." V24T438. Through a peephole, Wengert spied two females approach the door while signaling to two black males down the hall. V24T439. The would-be intruders went there to rob Donaldson and everyone else present. V24T1026. The would-be robbers included the two victims in this case, Lawanda Latisha Campbell and Donnta Head; State witness Wendy Kane; and some others. V24T439, V27T1026. They were armed. Kane said the plan was for Campbell and Kane to get the door opened so the others could burst in with guns, but they failed, and the would-be robbers fled. V24T440, V27T1028. The robbery victims called security. V24T588.

Other such home invasions took place against Donaldson's

Cape Drive home, which was occupied by Donaldson; Sheila Youngblood, his girlfriend whom he later married; their daughter; Sheila's other daughter; Wengert; Cisneros; and Melissa J. Wood, who was Sheila's girlfriend and a distant relative of Donaldson. V24T435-36, V25T778-80. On one occasion, some unknown assailant cut the phone line and broke in through the back door, stealing some items. V24T440-41, V25T786. On another occasion, the phone line was cut while the home was occupied, and somebody tried to get in. V24T441-42, V25T785-86.

On Saturday, July 9, 1994, Wengert, Cisneros, Straham, and Donaldson were home drinking liquor, occasionally leaving to buy more liquor and make sales. Everybody was drinking that afternoon and night. Wengert began drinking around 10 a.m. He drank about three 40-ounce Schlitz malt liquors that evening, probably the equivalent of at least ten normal cans of beer, in that malt liquor is stronger than beer. Straham started drinking at 10 a.m. with a quart of beer, and the whole group began drinking heavily when they got back from the mall at 4:30-5 p.m. That's when he began drinking gin, consuming between twelve glasses and a whole quart of gin, and he got pretty drunk. V24T443-44, V24T460-61, V24T558, V24T588-91, V25T614-15, V26T853-56, V26T941, V26T945-50, V26T957, V26T962-63, V26T971.

Sometime that evening, while sitting in his living room drinking, Donaldson phoned Campbell at the home of "Crazy Mike," about four miles away. Campbell was there with Donnta Head, Wendy Kane, Andrew Bernard Knox, and others. V25T796-99. Wengert said he was with Donaldson and overheard Donaldson's side

of the conversation. V24T444-45. Straham did not even remember this phone call taking place. V26T957.

Wengert said Donaldson had been sleeping with Lawanda Campbell. V24T436. Wengert claimed Donaldson said something about her being pregnant by him, that it was not Donaldson's, and "then he told her to go stand out in front of her daddy's house and that he would be by to shoot her." V24T445.

At "Crazy Mike's" fifteen minutes later, Knox and Kane went to the store. When they returned, Head and Campbell were standing on the corner. Head and Campbell said they were going for a walk, heading in the direction of Donaldson's house. V26T800-02. That was the last Knox saw of them. V26T803.

Meanwhile, about 15-30 minutes after the phone conversation with Campbell, Donaldson had a phone conversation with Campbell's father, Tommy Gainer, who lived nearby. Wengert and Straham overheard Donaldson's portion of the conversation. Donaldson and Gainer appeared to be arguing. V24T445-47, V26T854-58. "I guess her dad had some type problem with him," Wengert testified, "and he made the remark to her dad by saying, 'If you want me' -- he said, 'I ain't going to run from you, you know where I'm at.'" V24T445-46. Wengert then got on the phone and argued with Gainer. Wengert said he was on the phone with Gainer for only couple of minutes; Straham said it lasted for 1-1½ hours. V24T555, V24T578, V26T858, V26T958. Gainer threatened Wengert. V24T558. Wengert said he didn't know what the problem was, and he offered to talk it over to settle it. Suddenly, the phone went dead. V24T446-47, V24T583, V26T858. Wengert thought the

line had been cut and somebody was about to try to break into the house again. V24T447. Just then, somebody came to the front door. Straham said he heard a knock on the front door, V26T858, but Wengert said the front door bell rang, V24T448.

Direct testimony about the murders came from Wengert and Straham, both of whom admitted they gave contradictory evidence.

1. Straham's stories

Before testifying, Straham had given many statements before this trial, and said he lied in prior sworn statements, V26T896-99, V26T914, V26T919, V26T923, V27T1013, claiming he was merely "bending it [the truth] a little bit," V26T940. The prosecutor acknowledged Straham had been exonerating Donaldson for 1½ years before this trial and just changed his story right before trial. V26T902-03. Straham planned to surprise everybody with a changed story when he came into the courtroom, V26T956, but before trial the prosecutor got Wengert and Straham together, V24T510-11, V24T595, V26T951-52, V26T955, V26T983-86, and then Straham changed his story, V26T956, V26T983-86, V26T998, telling prosecutors he would change his story if deposed again, V27T1021. Straham even gave different accounts about why he changed his story, saying he changed his testimony after prosecutors "scared" him, V26T925, and saying he changed his story another time because he was scared of dying, V26T900, V26T940.

He began by testifying that when the phone went dead, there was a knock at the door, and Donaldson said to go out the back door. Wengert and Donaldson went around the house from the carport side and came back with Head; Cisneros came from the

other side. V26T860-61, V26T928, V27T1006. Straham did not go outside, V26T929, and he could not see if anybody put a gun to Head outside, V27T1008, but nobody had any guns with them, V26T961. Head came in voluntarily, walking in front of the others. Nobody grabbed him and he was not being forced inside. V26T961-62, V27T1007. Donaldson told them to go into the house. V27T1008. They all went to the living room. V26T863. Donaldson told Wengert and Cisneros to go get Campbell, which they did. V26T864. Campbell and Head sat together in the double wicker chair in the living room. V26T866. Straham recognized Campbell from the motel where he had seen her visit Donaldson. V26T865.

Donaldson talked to them about the prior robberies and attempts on his life. V26T866-68, T26V921. Donaldson appeared to be in charge, V27T1016-20, but Wengert took it upon himself to question them for a half-hour, even telling them Donaldson "'ain't got nothing to do with this conversation. It's just you and me, boy.'" V26T968-69. The questioning was not angry; it was more like a party, calm. V26T964, V27T1010-12. Donaldson did not have a gun. V26T967. Straham said he was at the dining table just outside the living room, drinking and watching a video while the others were in the living room. V26T868-69, V27T1004.

Campbell went to the bathroom. When she came out, she sat at the table with Straham. V26T869-71. She asked what this was all about and was she going to die. He assured her "no," she was not going to die, and he further declined to tell her what this was all about. V26T871-72. Cisneros came in, kicked her, and beat her to the floor. V26T872. Straham said he pushed Cisneros

away from her. V27T1005. Donaldson said nobody should talk to Straham any more. V26T872. After Cisneros struck Campbell, Donaldson said "'don't give a fuck about that bitch.'" V26T873.

Wengert and Cisneros brought her back to the living room. V26T873. Head was given a beer. V27T1012. A pager went off, and even though Straham did not recall any phone calls, he said Donaldson told him and Cisneros to pick up somebody from "the compound," a trailer park. V26T874-76, V26T972-74. They returned with Sykosky. V26T876-77. Straham and Cisneros never discussed anything with Sykosky about Head and Campbell on the way to the house, and Straham did not think there was any problem. He thought Sykosky came over to buy drugs, V27T1013, and Head and Campbell would leave while the rest went on partying, V26T974-77. Straham did not believe a murder was about to take place. V27T1010.

Straham went back to the dining table and got another drink, while Sykosky and Wengert went into the living room, which was separated from the dining area by a beaded curtain. V26T876-77. Straham still did not see Donaldson or anybody else with any guns. V26T978. Straham said on direct that Wengert went into the kitchen and turned up the stereo, which was already playing music. V26T878-79. He later changed his story, saying Wengert went in to turn the stereo on. V26T936. Wengert made only one trip to the stereo. V26T936.

Donaldson gave no instructions to Sykosky, and neither Donaldson nor anybody else ordered Sykosky to kill. V26T979. Neither Head nor Campbell were begging not to be killed.

V26T979. Straham heard five shots, but he believed they came from the music, not gunfire in the house, and he did not know anybody was being killed. V26T880, V26T936-39, V26T979. Donaldson stood there with his mouth wide open, stunned or shocked. V26T936-37, V26T880, V26T980, V26T999-1000, V27T1022-23. Donaldson and Cisneros ran toward the kitchen. Wengert turned down the radio, and somebody told Straham to move. Donaldson told them to move the bodies. Wengert and Cisneros carried one, Donaldson and Sykosky the other. Straham stayed in the kitchen. V26T880, V26T936-39, V26T1000-V27T1002. They had been in the living room about 1½ hours. V27T1003.

Sykosky began to clean up the blood. Straham said he did not do any cleanup and never touched the bodies. V26T882-82. Straham first saw the murder weapon, a 9-mm handgun, in Sykosky's possession when Sykosky picked it up from the table after the bodies were carried out. V26T883-84, V27T1008-09. He never saw a gun in Donaldson's possession throughout the entire episode. V26T942-43, V27T1009. He also did not see Wengert or Cisneros with a gun in their hands during the episode. V27T1009.

Cisneros and Wengert left with the bodies, returning about a half-hour later and looking pretty scared. V26T884. Straham stayed with Sykosky. He was scared and afraid to leave because Sykosky had the gun and he feared Sykosky would kill him. Donaldson and Straham then took Sykosky home. V26T885-86.

During the investigation, Straham told officials he did not even see Wengert or Donaldson that weekend, but later he told them he witnessed the killings. V26T899, V26T927, V27T1013-14.

He admitted having lied, having told different stories about Donaldson's involvement. V26T914-20. He told investigators Donaldson did not go outside to bring Head and Campbell into the house, but testified differently at trial, saying the earlier story was a lie. V26T915-18, V26T930. He said he lied when he told investigators Donaldson did not participate in questioning Head and Campbell. V26T919, V26T932-35. He said he did not tell officers that he had gone with Cisneros to pick up Sykosky. V26T976. He said he lied when he told officers the only time he saw a gun was when Sykosky went out the door. V26T929. He said he lied when he told investigators he had remained in the kitchen. V26T930. He said he lied when he told officials he left after the shootings. V26T938-40. He said he lied when he told officers one person went out to see who had knocked on the door. V26T930-31. He characterized Wengert as his closest friend, "like a brother to me," V26T846, but admitted he lied time and again to blame Wengert and to make him the fall guy as the one who ran the show, V26T934-35, V26T940-41, V26T970.

Straham also acknowledged that his memory of events that night might have been affected by the fact that he was drinking heavily that night and got pretty drunk. V26T958, V26T972.

2. Wengert's stories

Before he testified, Wengert had talked to officers and prosecutors at least ten to twelve times, V23T396, V24T402-03, V24T496-505, V24T557, admitting that he came up with new facts each time he was questioned, V24T564. They even got Wengert and Straham together to discuss the case before trial. V24T510-11,

V24T595. He admitted lying before he made his plea deal, but claimed he told the truth afterward. V24T597.

He said when the front doorbell rang after the phone went dead, he jumped up and looked outside, seeing Campbell and Head. Wengert, Cisneros, Straham, and Donaldson grabbed guns and ran through the back door and around the house, Straham and Donaldson from the left, Cisneros and Wengert from the right. Cisneros put a gun to Head, took him inside, and seated him in two-seat wicker chair in the living room. Campbell ran down to the corner. Donaldson told Cisneros and Wengert to get her, which they did. Cisneros grabbed Campbell from behind a car where she was hiding, put a gun to her head, and walked her back to the house. She sat in the wicker chair next to Head. V24T448-51. Wengert did not see Head and Campbell carrying weapons. V24T514. He said they were being held against their will, and he doubted they could have gotten up and left if they wanted to. V24T514-15.

Wengert, Donaldson, and Cisneros were in the living room, while Straham sat at the dining room table by the beaded doorway adjacent to the living room. Donaldson, Cisneros, and Wengert questioned Campbell about why her daddy was trying to rob them. She did not answer, but she admitted she tried to rob Donaldson at the Marina Bay Motel. She looked scared, like she was going to cry, and asked if she was going to die. V24T451-53. Head said he came to the house that night to buy some crack so he could sell it for profit. V24T453-54. Wengert said Donaldson and Cisneros did most of the questioning, while Wengert admitted to very little: "I had asked a question." V24T575.

Wengert said Donaldson had on his lap a 9-mm handgun with a brown, starred handle and a long-nosed barrel. Cisneros had a .22-caliber and a .25-caliber automatic. Wengert had .22-caliber and .25-caliber automatics. V24T455-56, V24T508-09.

Campbell went to the bathroom. When she came out, she went first to Wengert, then to Straham in the kitchen, and asked if she was going to die. They both assured her no. V24T456-57. Donaldson purportedly said, "'I don't care about that bitch,'" and Cisneros said, "'Well, seeing that you don't care about that bitch, that means that you don't care what I do.'" V24T458. Cisneros jumped up, ran in the kitchen, and slapped or punched Campbell once or twice and kicked her a few times when she fell from the chair. V24T458, V24T592. At the time, Wengert was seated in a beanbag chair in the living room near the beaded curtain separating that room from the dining room; Straham was at the dining room table; Donaldson was on the couch in the living room; and Head was in the wicker chair in the living room. V24T457-60, V24T593.

Head at first denied having been one of the Marina Bay Motel robbers, but he later admitted it after Campbell insisted that Head had been one of the robbers, V24T453-55, and after Cisneros attacked Campbell, V42T461. Head asked for a drink. Donaldson had Wengert get Head a 40-ounce beer.

Both Head and Campbell asked "'Are we going to die,'" and everybody assured them they would not, including Donaldson, who said "'You're not.'" V24T461-62, V24T536.

Donaldson's pager went off. He checked the number and put

the pager down, but when the pager went off again, Donaldson returned the call, telling the person to sit tight, that Donaldson might need him for a favor. A little while later, Donaldson called back and told the person he was sending Cisneros and Straham over to pick him up. V24T462-64, V24T575-76. Cisneros and Straham returned about a half-hour later with Sykosky, whom Wengert had seen buying cocaine from Donaldson. V24T464-66. Donaldson and Cisneros told Wengert that Sykosky owed Donaldson quite a bit of money for drugs, and "[i]t was brought up that if he did the job and done it right, that his debt would be clean." V24T496, V24T501-02.

Straham returned to his seat in the dining room, Cisneros sat beside Donaldson in the living room, and Sykosky stood in the living room in front of Head and Campbell. Wengert said Donaldson handed Sykosky a gun. Sykosky asked if these were the ones he wanted him to take care of, and Donaldson said yes, but told him to hold on. V24T467, V24T513, V24T561, V24T577, V24T584. Donaldson told Wengert to go into the dining room and turn on the stereo. Wengert turned it on and returned to the beanbag chair, but Donaldson told him to make it louder, which Wengert did. V24T466-69. "And then when I had turned to look back into the living room and go back in to sit down I had seen Joe, he had shot the boy and the girl." V24T469. They curled up and fell to the floor. V24T469. Wengert just stood there. V24T470, V24T594.

Wengert claimed that before Sykosky arrived Donaldson told him to kill Head and Campbell, but Wengert did not think he was

serious. V24T513-14. Then Donaldson handed Sykosky the gun and said, "'Kill them.'" V24T513, V24T536, V24T553. That was the first time Wengert believed the victims would die. V24T513.

Donaldson told Cisneros and Straham to put Head in the trunk of the car, and had Wengert put Campbell in the trunk with another's help. V24T470-71, V24T584. Donaldson told Cisneros to drive and Wengert to get in the back seat. The three headed down 98 toward Pensacola, stopped for gas, and went toward Navarre, making a right turn onto a side road where they took the bodies out of the trunk, carried them half-way into the woods, and left them there. V24T472-74. They headed back towards the house, stopping first at a dumpster behind Food World where they emptied the trunk and dumped the contents. V24T474-75. Then they went to another dumpster, tossed their clothes, returned to the house, and showered. V24T475. Cisneros cleaned up the linoleum floor; Donaldson and Sykosky scrubbed the carpet. Wengert and Cisneros picked up spent shells and handed them to Donaldson for disposal. Donaldson told Cisneros and Straham to take Sykosky back, and told Sykosky to get rid of the gun. V24T476-78.

Wengert began lying to officers early in the investigation, initially not saying anything about his participation in the murders, and later lying about being in Panama City at the time. V23T400-02, V24T492-93, V24T500, V24T512-13, V24T528-30, V25T608. He lied about never before having seen Sykosky. V24T501, V24T550-51, V24T556, V24T562, V25T610, V26T833-34. He had not told officers about Donaldson telling Campbell, in the first phone call, to stand by the road so he could shoot her. V24T502-

03. He had not told officers regarding the second phone call that he got on the phone with Head, not Gainer. V24T552-53. He had not told officers he helped get Campbell and Head into the house. V24T504. He had not told officers Donaldson told him to turn on the music when Sykosky committed the murders. V24T506-07, V24T554. He had not told officers he carried a gun during Sykosky's murderous episode. V24T507-08, V24T535. He had not told officers that Head and Campbell asked not to be shot. V24T563. He claimed to have told Donaldson not to do it and that he didn't want anything to do with it, yet he lied to officers about that, telling them he turned his back and was fixing to walk out and leave, whereas he did no such thing. V24T537, V24T553-54. He had not told officers that he had seen the shooting, contrary to what he testified to at trial. V24T563. He omitted telling officers about how he helped remove the bodies. V24T538, V24T550. He omitted telling investigators that Straham went with Cisneros to pick up Sykosky. V24T543-50. Wengert claimed he has "never" sold "dope." V24T587.

Despite all the booze Wengert drank on the day and night of the murders, and despite being shot, suffering from shock, and being doped up on a pain pill, ten shots of codeine and ten shots of morphine shortly after the murders, see infra, p.18, Wengert claimed to have remembered virtually everything about what happened at Cape Drive that night. V24T591, V24T597-98.

3. After the murders

On the morning of July 10, Linda Chapman, Cynthia Langley, Pop Strickland, and Kelley Strickland came over to the Cape Drive

house. Langley, a chronically addicted cocaine abuser, and Chapman, went there to buy crack cocaine. Donaldson, Wengert, and Cisneros had guns. V26T816, V26T805-11, V24T479-80. Langley did not see Straham, and Straham did not see her, though he said he was there at the time. V26T806-08, V26T896-97, V26T981. Straham did see Pop and Kelley Strickland, and he heard Donaldson tell them "'We just killed two kids.'" V26T887, V26T982.

Straham said after they left, everybody went to sleep. Around 8:30-9:00 a.m., he and Donaldson went to a car wash where Donaldson washed the car. V24T586, V26T889-90. Then they went to pick up Sheila and dropped off Straham at his grandmother's house where he had been staying. Later, Donaldson, Wengert, and Cisneros pulled up at Straham's grandmother's house where they were supposed to help Straham clean out the shed, but Wengert said they had something to do and they left. V26T889-90.

Wengert, Cisneros, and Donaldson played cards and drank, then drove around to make some money. V24T480. At about dusk, Wengert said, Pop and Kelley Strickland came over with a new 9-mm Luger, which they sold to Donaldson. T24T485.

At some point that night, Donaldson brought a woman to the Cape Drive house from the motel where she had been staying. Later, Wengert and Donaldson left in the car to return her to the motel, leaving Cisneros at the house. Suddenly, persons in another vehicle chased Wengert and Donaldson and started shooting at them. They tried to get away, but the other car found them and started shooting again. Wengert and Donaldson finally managed to drop off the woman, but on their way back to the house

the other vehicle found them and started shooting again. Numerous shots hit their car, and Wengert was shot in the left leg. V24T486-87. They returned to the house, and Donaldson had Cisneros take Wengert to the hospital. By this time it was around 2 a.m. on Monday, July 11. V24T488-90. Wengert was admitted and given a pain pill, 10 shots of codeine, and 10 shots of morphine. V24T491, V24T526-27. He was in shock. V24T497, V24T530, V24T597-98. Wengert believed the people who shot at them were head's father, Tommy Gainer; Ryehyiem Morris; and two or three others. V24T492.

Donaldson went by Straham's grandmother's house that afternoon, told him that Wengert had been shot, and asked him to go to the hospital with him. Straham declined. V26T891-92.

Later that day, Melissa Wood drove Donaldson and Sheila from the home of Donaldson's sister, Aquenetta, where they used to live, to the Cape Drive home to get things for the kids. Wood said they drove back to Aquenetta's, and after work, Wood drove Donaldson, Sheila, and the kids to the bus station in Pensacola. Sheila told Wood they were going to Texas. In the ensuing weeks, Sheila and Donaldson married. V25T782-86, V25T792.

On Monday, July 18, 1994, investigators arrested Donaldson "without incident" upon his arrival from Houston at the bus station in Ft. Walton Beach. V23T393-94. They also arrested Wengert and Cisneros. V23T390, V23T395. Sykosky went to California, where officers arrested him a couple weeks later. V23T395, V24T572. They did not arrest Straham. V23T393.

A forensic examination of projectiles recovered from the

victims showed all were fired by one firearm, "a 9 by 18 Makarov." V25T679. They could have been fired from a Russian-made Makarov or a Chinese-made Makarov, or possibly other weapons. V25T680-81. Additional items pertaining to a variety of handguns were collected from the house, including packaging, casings, and a disfigured .25-caliber projectile. V25T665-74, V25T683. The murder weapon was not recovered.

Convicted felon and gun trafficker Geoffrey Cowart owned a 9-mm Makarov, which he bought from Frank Manring about two days before the homicides. V25T737-38, V25T744-45, V25T731-34. He sold the gun to Kelly Strickland for $200, claiming on direct testimony that he sold it on the day of the murders, V25T742-43, but contradicting himself later saying he might have sold it two weeks earlier, V25T744. He was told he would not be charged with any firearm violation in this case. V25T744. Wengert claimed Pop and Kelly Strickland brought the murder weapon to Donaldson on the morning of the murders. V25T510.

Investigators who examined the Subaru found bullet holes in the car and blood inside the passenger compartment and trunk. V23T383-84, V25T647-54. Under the vehicle they saw what appeared to be leaking coolant. V23T383-84. They also recovered two small caliber handguns from the vehicle, neither of which was the murder weapon. V23T384, V25T764-66, V25T679.

Investigators found a large reddish stain on the back side of an area rug and on the carpet beneath in the house. They found a bullet hole in the floor in front of a two-seat wicker chair, but no projectile. They found a suspected blood stain

around the hole and on the bottom front of the chair. V25T654-56. No blood was found on the wicker chair. V25T670-71. That does not exclude the possibility that blood was there but was washed away with certain household cleansers. V25T671-72. A Luminol test revealed suspected blood in the kitchen leading from the living room to the back door. V25T663-64.

DNA test results of blood swabbings taken from the trunk and the home were consistent with the blood of the victims. V25T668-95. Negative DNA test results were obtained when the wicker chair and a piece of carpet were tested for blood, V25T696-700, showing that the presence of blood there could not be proved.

A passerby discovered the bodies Sunday morning, July 10, along the Santa Rosa County side of the Santa Rosa/Okaloosa County line. V23T357-58, V23T364-65. Head was clothed in socks, Campbell in socks, panties, and a bra. V23T369-70. Nearby was a substance that looked like anti-freeze fluid. V23T358.

A forensic pathologist said Campbell died from two gunshot wounds. One shot entered the head, passing through the brain, neck, and left shoulder. The second shot hit the chest, crossing into the liver, the small intestines, the aorta, and lodging in the spine. Two projectiles were recovered from the body. There is no way to discern which shot occurred first. The head wound would have caused immediate unconsciousness, and the gunshot wound to the chest, though not necessarily causing immediate unconsciousness, was lethal and would have resulted in death within minutes. V25T713-18. There was no evidence of pain or suffering. Being struck with an open hand or a soft blunt object

may or may not leave a discernable mark, but none was found, and there was no evidence of other injury or trauma. V24T726-27.

Head died from three gunshot wounds. One shot struck the left side of the head towards the back below and behind the ear, passing through the brain. Another shot struck his upper left arm, passing into the chest and crossing his body. Another shot struck the back part of the left side of the armpit, crossing through the chest and right arm. Two projectiles were recovered from the body. The head wound would have caused an immediate loss of consciousness. The other wounds would not have caused immediate unconsciousness, but both were lethal because they went through major organs. V25T721-26.

The defense presented no witnesses. V27T1038, V27T1070-71. After the charge conference, V27T1041-69, the court denied motions for judgments of acquittal. V27T1071-72. The attorneys gave closing arguments, V27T1076-1163, and the next day the jury found Donaldson guilty as charged, V13R2528-33, V27T1194-98.

B. Penalty Phase

1. Prior conviction of accessory after the fact

Over repeated and continuing objections by defense counsel both before and during the trial, e.g., V13R2576, V14R2631, V28T1203-24, V28T1232, the judge permitted the State to introduce testimony to establish that a prior conviction for accessory after the fact, flowing from the June 1991 murder Paul Alan Mahugh committed by Schrolf Barnes, was tantamount to principal to murder, a prior felony conviction involving the use or threat of violence. § 921.141(5)(b), Fla. Stat. (1993). In all, the

State presented five witnesses, as well as years-old evidence including photographs; an autopsy report; a witness's handwritten statement; two tape-recorded statements; a deposition taken by a different defense lawyer for a different defendant; and an information charging a different crime. The testimony itself consumed nearly a whole volume of transcript. T28V1227-1387.

First to testify was Don Vinson, Okaloosa County Sheriff's investigator, who said he had participated in the 1991 investigation. He said Mahugh, John R. Peek,[4] Jeff Myrick, James Kasten, and Herman Hicks, Jr., all white males, had been congregating by Mahugh's van in the parking lot of the Lucky Strike Bowling Lanes early in the morning of June 9, 1991, when the incident occurred. V28T1229, V28T1234, V28T1238. Mahugh died two days later. V28T1229. Others involved in the incident were Barnes, Donaldson, his brother Mario, and Christie Smith. V28T1234. Photographs depicted Donaldson with a bleached streak in his hair. V28T1235-37. The State also introduced a portion of the Mahugh autopsy report. V28T2229-33.

Vinson said numerous witnesses claimed to have seen the killing, including Kasten, Christie Smith, and a Mr. Robinson. However, only Kasten could have been telling the truth because only Kasten could have seen the murder blow given that Kasten was in the passenger seat of the vehicle at the time, and the others were not credible and were not in a position to know what happened. V28T1239-40, V28T1254.

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[4] Various witnesses erroneously referred to Peek as Peck, but that was later corrected. V28T1237.

Vinson said Kasten in 1991 gave taped and handwritten statements and a deposition in the two cases of State v. Barnes and State v. Donaldson, Nos. 91-925 and 91-974, in which charges arising from the Mahugh murder were pending. The State offered those hearsay statements into evidence, noting that Kasten was unavailable because he is on military duty in the Persian Gulf. The defense objected because it had no opportunity to rebut the hearsay. Yet neither of the attorneys representing Donaldson in the present capital penalty phase, John C. Harrison and Chris Saxer, were present when any of Kasten's statements were made. Saxer had been one of the attorneys representing Donaldson in that case, but he did not hear any of those statements at that time, he had no notice of that deposition, and he did not participate in the deposition. The deposition was taken by Barnes's attorney, Nick Petersen, not by Donaldson or his attorney. Donaldson's defense attorneys in this case have never even talked to Kasten, Saxer said. The State argued that a sufficient opportunity to rebut Kasten's hearsay existed because Kasten had been available in 1991, Donaldson could put on other witnesses, and Donaldson could testify. The judge overruled the objection and permitted the State to introduce the evidence. V28T1241-49, V28T1370, V28T1290.

Vinson said Kasten unambiguously and repeatedly identified Barnes as the killer. V28T1255-58, V28T1260-61. Robinson and Smith, whom Vinson did not believe, said Donaldson struck the blow. V28T1257. Vinson interviewed Donaldson in 1991, and a recording of that interview was introduced over objection.

V28T1250-51. Donaldson said the whole thing began when, as he rode a bike past Mahugh's group, members of that group shouted racial slurs at him. V28T1253. Vinson said Donaldson bragged to friends that he was the one who swung the bat, V28T1257-60, but he told officers in his statement that in fact it had been Barnes, not Donaldson, who struck Mahugh with the bat, V28T1260.

After suffering the injury, Mahugh got in the van with Kasten and Peek. Mahugh started vomiting, so his friends took him to the hospital, where he never regained consciousness, Vinson said. V28T1238.

Hicks was next to testify. He said he, Myrick, Mahugh, Peek, and Kasten had been riding around and then sitting by the bowling alley, drinking, when the incident happened. V28T1261-65. Donaldson rode by them on a bike around 2:30-3 a.m., hollered out some kind of cracker or something like that, and Myrick responded with "'Fuck you.'" V28T1266-67. Donaldson then said, "'Y'all just wait right there and we'll be right back,'" Hicks said. V28T1267. Some time later, four black persons came back, Donaldson carrying a baseball bat. Hicks claimed they came over and pushed them. V28T1267-68. Hicks said Donaldson went with another guy to the driver's side of the van, while Christie was on the side of the van where Hicks was, carrying a two-by-four, threatening to hit them. V28T1268-69. Hicks heard a thump, Mahugh went down, and the two guys who had been on Mahugh's side of the van hollered and ran off with the others. V28T1270-71. Hicks said nobody in his group was fighting, and nobody used the word "'nigger.'" V281269-72.

The State next played Kasten's recorded statement to the jury. V28T1274. Kasten said a black guy rode by on a bike, and Kasten heard something he did not understand. The next thing he knew that guy came back with three other guys and a girl. One had a chain, two had a bat, but the girl was unarmed. V28T1275-77. Kasten was sitting in the van and Mahugh was standing by the door. Barnes and Donaldson grabbed Mahugh, held him against the door, and Barnes hit Mahugh with the bat. V28T1275, V28T1284. Kasten said the white guys made no racial slurs, but the black guys called the whites "honkies" and "crackers" and did most of the cursing. V28T1281-82.

The State presented investigator Wilford Moran, ostensibly to explain Kasten's unavailability. Donaldson tried to stipulate to Kasten's unavailability and further objected to Moran's testimony as irrelevant. The State would not accept the stipulation, and argued that there was no prejudice to the defense. The judge allowed Moran to testify. Moran said Kasten was in the U.S. Navy on assignment in the Persian Gulf serving aboard the U.S.S. George Washington. V28T1287-89.

Kasten's deposition was read to the jury. V28T1290. Kasten was a state trooper trainee in Illinois. V28T1291. He had been with the others, bowling, driving around, talking on the CB radio, and the others were drinking. He saw but did not hear the bicyclist. Myrick said somebody in the street said he's coming back and bringing some friends. V28T1295-97. He heard no racial slurs and did not hear the word "nigger." V28T1295-96. They continued fooling around. Then he saw the bicyclist return,

standing on the passenger side of the van with others, harassing Kasten's friends. He did not see a weapon in Donaldson's hands. V28T1297-1300. Barnes and Donaldson walked to the driver's side of the van. V28T1312-15. Donaldson pushed Mahugh against the door and struck Mahugh just once, on the lip, with his fist. Barnes hit Mahugh on the left side of the head with a wood bat at about the same time. He never heard Donaldson say anything. V28T1300-09, V28T1328-30.

Police took the group to a house where four black males were sitting outside. Kasten identified Barnes as the killer and Donaldson as the one who pushed Mahugh. V28T1315-17, V28T1322-24. All four had something in their hands when they walked up, but Kasten never saw Donaldson with a bat. V28T1318, V28T1330-31.

Investigator Steve Ashmore testified that in 1991 Mario Donaldson said Barnes and Charles Donaldson were on the driver's side of the van, but Mario did not see the blow. V28T1340-41. He said Charles Donaldson told him he heard a racial slur as he rode by Mahugh's group, returned with friends, and Barnes hit Mahugh with a bat. Donaldson said he did not strike Mahugh. V28T1342-43. Barnes told him Donaldson struck Mahugh with the bat, Barnes admitting only to striking Mahugh with his fist. V28T1343. Barnes said he carried a flashlight. V28T1344.

The State played Donaldson's 1991 interview for the jury. V28T1345. Donaldson said while riding on his bike, he heard someone say something like "'where you going, nigger?'" He kept riding, and the guy said, "'goddamm it, come here, I'm going to get you nigger, or something like that.'" Donaldson turned and

said, "'like what.'" The guy said "'you heard me.'" He said "[a] lot of white people call me nigger, you know, so it didn't really piss me off." V28T1358.

Donaldson went home and told Mario and Barnes what happened. V28T1346-47. Donaldson picked up a bat, which everybody referred to as "bam-bam." Barnes had a flashlight. They went back to the van with the others. V28T1347, V28T1358, V28T1364. Mahugh appeared to be digging something out of his van. Donaldson went around to Mahugh's side, dropping the bat. Barnes went around too. V28T1347. "I bent down looking for it, and the next thing I know, Schrolf had got the bat and hit" Mahugh. V28T1347, V28T1355. Donaldson did not know where the flashlight had been put. V28T1364. Donaldson took the bat from Barnes and left with the others. He said he did not touch Mahugh or throw a blow at him, although he pushed the door of the van because Mahugh was between the door and the van. V28T1347-50, V28T1255.

After the incident, Donaldson said he told his friends "'we smashed that cracker,'" taking some responsibility for what had happened. Barnes didn't think it was a big deal, even laughing. "I was the smallest one there. I was trying to look bad and really impress my brother and impress him, but I did not touch him." V28T1352-54, V28T1360, V28T1364-65. Donaldson consistently maintained that no matter what he said among his friends, he did not strike Mahugh with the bat; Barnes did. V28T1354-55, V28T1362-63.

The last State witness on this issue was Assistant State Attorney David E. Fleet, who prosecuted the Mahugh murder case.

V28T1366-67. He was permitted to testify over Donaldson's additional objection that it would be cumulative. V28T1365-66. Barnes entered a plea of no contest to second-degree murder, a first-degree felony, on November 26, 1991, without a plea agreement, and with the State recommending a guidelines sentence of 22 years' imprisonment. Barnes got 22 years. V28T1368-69. Barnes's judgment, score sheet, and sentence were introduced, showing that Barnes scored 244 points and was eligible for a guidelines sentence of 17-22 years' imprisonment. V28T1382.

Fleet said Donaldson entered a negotiated plea of accessory after the fact, a third-degree felony, in exchange for his agreement to testify against Barnes if necessary. The guidelines called for up to 30 months' imprisonment, the prosecutor agreed to recommend a 30-month cap, and he got 30 months. V28T1370-72. Copies of the judgment, plea, and score sheet were introduced, demonstrating that Donaldson scored only 34 points, and was eligible for a guidelines sentence ranging from community control to 30 months. V28T1338-39, V28T1380-81.

Fleet did not believe he could prove at trial beyond a reasonable doubt that Donaldson was the one who swung the bat. V28T1376-78. He also felt it was more likely that Barnes was the killer. V28T1376. Kasten was the most credible witness as to the actual striking. V28T1384. He believed Donaldson instigated the episode and participated in the violent act that resulted in Mahugh's death, and he could have been charged with principal to second-degree murder. V28T1385-86. But, "the most prudent way to pursue these cases with the greatest likelihood of success in

front of the jury" was to use Donaldson's cooperation to convict Barnes as the killer. V28T1374.

2. Additional evidence regarding these homicides

Wendy Kane was the only other witness in the State penalty phase, testifying over repeated objection about the phone call between Campbell and head on the night Sykosky committed the murders. When Campbell got off the phone, Campbell told her she had been talking to Donaldson. "She just said he had called and told me to walk out to the street where he could come by and shoot her." V28T1396. Campbell showed no emotion when she said that. V28T1398. Afterward, Campbell went outside. V28T1399.

3. Mitigation evidence

(a) Family and personal background

Various family members testified on Donaldson's behalf, including Charles, his sister Aquenetta, his mother Tina, and his wife Sheila. Charles is regarded by his family as a loved person, not a troubled child, but a child one who just needs a chance to get his life on the right road. Charles never "really had a chance in life," Tina said. "He just probably got around the wrong group. He's a good child." V29T1438-39, V29T1472. Aquenetta believes he should not suffer the death penalty for a murder somebody else committed. V29T1439.

Charles, born May 21, 1973, was the fourth of seven children. The oldest was Aquenetta; then Alfonso, now deceased; Mario; Charles; Jessica; Cornelius; and Victoria. Aquenetta is about 10-12 years older than Donaldson. The seven were sired by five fathers. Aquenetta, Alfonso, and Mario were fathered by

Abraham Donaldson. He is now deceased. Charles was fathered by Donall McKinnie. Jessica was fathered by Bay King. Victoria was fathered by Antonio Robinson. V29T1429-30, V29T1453-54-58. Charles grew up believing Abraham was his father. His mother just told him the identity of his real father while Charles was awaiting trial. Not knowing about his real father bothers him. V29T1455, V29T1535, V29T1565, V29T1588.

During Charles's youth, Tina was employed on and off as a housekeeper and nursing assistant. Alfonso took care of Charles until when Charles was nine, when Alfonso was killed July 27, 1982, in a hit and run accident while bicycling on his way to work. V29T1431-32, V29T1456-57. After Alfonso died, Charles started acting differently, distant, Aquenetta said. V29T1432.

The family, including Charles, regularly attended church while growing up. He sang in the choir, made up his own songs, and almost recorded one. Charles was musically very talented at playing the organ and singing in the choir. V29T1437-38, V29T1470. His mother made him go to school, teaching him to be a good student and to earn an honest living. V29T1474-75.

Charles was born in Troy, Alabama, and moved with his family to Ft. Walton Beach as a small child. The family moved to Georgia when he was young but then returned to Florida, forcing Charles to split his education among different schools in different locations. When Charles was around 12-14 years old, he moved back to Rome, Georgia, for two or three years, away from his mother, brother, and sisters, to succeed Aquenetta in taking the responsibility of caring for his elderly and infirm

grandparents (his mother's mother and step-father). Tina said he was the best, smartest child she had to help out that way. V29T1432-35, V29T1457-58, V29T1461-62, V29T1564-65.

His grandmother had cancer. She was on a lot of pain medication and would be knocked out part of the time. His grandfather also was very ill and senile. Charles bathed them, cooked, cleaned, cut and chopped wood to make sure they had firewood to heat the house, and generally took care of all their needs. He never had any free time. He would get up at 5 a.m., wake them, get their beds clean, get his grandfather's body exercised a little bit, give them medication, cook breakfast, make sure there was wood in the stove, and then go to school by 7:30 a.m.. School would end around 3 p.m., and he would get home to care for them around 3:30 p.m. each day. He attended church two or three times a week, and he won some kind of academic award there. V29T1566-68, V29T1433-35, V29T1463.

Charles felt immense pressure living that way. At 16, he ran away from home, brought back only after his grandmother asked police to look for him. Then he tried to kill himself by taking his grandmother's pills and was hospitalized. After his release, he ran away again and became involved with a 26-year-old woman, Jane. They fell in love and moved in together. Jane introduced him to drugs. V29T1568-71, V29T1464-65.

Drugs led to his involvement in criminal behavior. He became a"do-boy", someone who would hold drugs and stand in a certain area to dispense the drugs while one of his associates cut the deal and took the money. Some months later those same

individuals got involved in a robbery and murder. Charles did not know anything about that crime, but he was arrested and temporarily placed in juvenile detention, probably as a witness. His mother sent Aquenetta to Georgia to help out. Authorities released Charles when they determined he had nothing to do with the crimes. Then he moved back to Florida, staying with Aquenetta and their mother. V29T1433-36, V29T1440, V29T1464-65, V29T1571-73, V30T1607-09.

Some time after his return to Florida, he became embroiled in the Mahugh case. Charles reiterated to the jury what he told investigator Vinson years earlier. V29T1535, V29T1599. He was riding along on a bike and was called a "'nigger.'" He told his friends, and they returned with him to the scene. He carried the bat for intimidation, but not to put anyone in fear. V29T1592-93. Donaldson characterized himself as a "very rowdy" person at the time that happened, and he found the racist remark particularly upsetting. He wanted to find out who called him a nigger. V29T1594-95. When he got to the scene, there was some pushing and shoving, and he did shove somebody with his hand, but did not touch anyone with the bat. V29T1595-97. He noticed Mahugh was digging up under the seat as if he was trying to get something. He told that to Barnes. Barnes and he went around to that side of the van. Donaldson hit his knee on the bumper, dropped the bat, and went down. Barnes picked up the bat and walked over to Mahugh. Donaldson got up, walked over, and asked Mahugh what was he doing. Mahugh responded that it was cool, he and his friends were just hanging out. Donaldson pushed the

door, and the door ricocheted and pushed Mahugh. Barnes swung the bat at the same time, downing Mahugh. V29T1597-99, V30T1604-05. Donaldson took the bat and carried it away from the scene, V30T1602, later laughing about it and falsely bragging to his friends about what had happened. V30T1604.

Charles was 18 when he went to the Lancaster Correctional Institution. While there, he received vocational training as a printer, getting a printing certificate and changing his life. He served out his time, and was released. V29T1436, V29T1446, V29T1535, V29T1561, V29T1573.

Charles got out of prison in October 1992 at the age of 19, and in 1993 he went to the Private Industry Council (PIC) to learn a trade and get a job and education. He was training to be a printer. V29T1401-03, V29T1414, V29T1436-37, V29T1446-47, V29T1465, V29T1561. Rhonda H. Ivory, PIC's youth coordinator, said participants included those with criminal records, disabilities, and others with low income. V29T1413. Charles openly acknowledged to PIC officials he had a criminal history. V29T1407-09. Charles previously had been employed as a fast food worker at Wendy's in 1990 and again in 1991. V29T1416.

Participants in the program typically move from one activity to another, and that's what Charles did. V29T1412. He worked some part-time jobs hoping to get a printing job but he was unable to obtain one. V29T1414-15, V29T1446, V29T1561-62. He did get other part-time jobs, and continued to work for his General Equivalency Diploma (GED). V29T1404. Ivory said his supervisors believed he did a "good job." V29T1405, V29T1411-12,

V29T1415. Charles had good intelligence, tested well, had the ability to do well in the work place, and could be a productive citizen. V29T1406. He also was "very successful" in a program he participated in at Eglin. V29T1419.

One of the places he was assigned was Kelly Temporary Services. Kelly's Diane Rogers knew of Charles's record. V29T1420-21. Charles worked with Kelly from August 1993 to February 1994. V29T1421, V29T1561-63. Although Rogers was unable to find him any printing jobs, Charles ably performed the jobs to which he was assigned, he was intelligent, and if given the opportunity, he could have held down a job as a productive citizen in the community. V29T1421-23. However, the little money Charles earned from Kelly caused him to turn to drugs to earn money. He started by selling marijuana, but because it moved too slowly, he ended up selling crack. V29T1563.

Charles started to backslide. "Kids do that all the time," Ivory said. The first time Charles was signed up to take a GED exam, he did not take it because he was being held on drug charges. V29T1410-11. He did not show up for pre-employability skills in April 1994, Ivory said, and PIC officials terminated his participation in the program when they learned he had been arrested on charges in this case. V29T1411.

Charles became romantically involved with the woman he later married, Sheila Denise Donaldson. They married in July 1994 and have a daughter together, Tangela Latoya Donaldson, who was two years old at the time of trial. Tangela knows her father, and has been to see him. V29T1443.

Charles and Sheila discussed relocating to San Antonio, Texas before the incident involving Head and Campbell occurred. V29T1444. Since Charles's arrest, their marriage has faltered. Sheila said she is seeking a divorce because she needs to take care of the children and get on with her life. V29T1447-48.

Charles admitted he was involved in drug-related crime, but not just as a small-time dealer; he was also a victim, for repeatedly he had suffered violent crime himself. The kind of crime Head and Campbell attempted against Donaldson and his friends at the Marina Bay Motel was only one of many such incidents. Mohamed Ryehyiem Morris, who had been convicted numerous times of violent felonies and drug charges, V29T1479-81, personally had been involved in three armed robbery attempts on Donaldson over the period of 1993-1994. V29T1487-88.

In the first incident, Morris approached Donaldson who was sitting in a car. Morris knocked the window out of Donaldson's car with the barrel of a .38-caliber gun and shot over the car when Donaldson tried to avoid being robbed. Donaldson fled and did not retaliate. V29T1488-92.

On another occasion, Morris and three others, including Tommy Gainer -- Campbell's father -- went to Donaldson's Cape Drive home, armed with a shotgun, a 9-mm gun, a .380-caliber gun, and a .45-caliber gun. The plan was for two men to walk to the front, two to the back, kick the door in, and commit the robbery. They did not go through with it because one of the men saw Donaldson sitting alone in his living room with a chrome pistol. V29T1492-96, V29T1498-99. At the time, Gainer, a drug addict,

had been selling dope for Donaldson, but Morris thought he wanted to retaliate for something he thought Donaldson may have done to his daughter. V29T1499, V29T1517.

On a third occasion, Morris and three others headed to Donaldson's house to rob him but on the way they saw four others who were heading there to do the same thing. They got out of their cars and talked. None of these individuals had been with Morris in his prior attempts to rob Donaldson. About three of the eight had guns. Morris used a 9-mm gun. V29T1497-99.

After the murders, Morris and Gainer got guns and drove around looking to confront and kill Donaldson because Gainer believed Donaldson had been involved in their deaths. Three times they got into shootouts with Donaldson and his friends on the night after the homicides. V29T1506-10, V29T1518-19. When Morris saw Donaldson in the jail afterward, Donaldson never attempted to retaliate or say anything about it. V29T15012-13.

Morris knew that Donaldson routinely carried a gun, a chrome gun, possibly a .38-caliber, as did those with whom Donaldson hung around. V29T1515-16. Morris also said robbing people involved in the drug business was commonplace, and often robberies would result in shootouts. V29T1495.

Although the State characterized Head and Campbell throughout the trial as mere children, their friends knew them to be robbers, schemers, and thieves. Head was addicted to "scudder," powder cocaine. Tyrone Prather, Head's best friend, characterized Head as an armed robber who carried a firearm, engaged in "booing" people (giving them phony drugs for money),

and preyed on others involved with drugs. V29T1526-30. Eddie Armstrong, a convicted drug dealer, said Head and Campbell were partners in crime. As a team, they set up innocent victims by having Campbell pretend she would to have sex with the victim in a hotel room while Head, waiting nearby, would burst in and rob him. V29T150-24. Morris said Head had tried to rob Donaldson with a .45-caliber gun, but he did not know if Campbell was involved in that robbery. V29T1500, V29T1506, V29T1514-15.

(b) Events surrounding the homicides

Before the events of June 9, Sheila decided to stay with her kids at Aquenetta's house because there had been many break-ins at the Cape Drive residence, and she was afraid. V29T1450-51.

Donaldson said on the morning of June 9, he, Cisneros, and Wengert were drinking and riding around looking for a friend Jason, a barber, to do their hair, and trying to buy marijuana. Donaldson is a heavy marijuana smoker, smoking it every day. They went back to the house where they sat around drinking alcohol and playing cards all day. Joining Donaldson, Wengert, and Cisneros, were Jason, the barber, who came with two guys, and later Straham and a person named Javon. V29T1535-37.

As Donaldson headed out on a beer run, he got paged by Pop and Kelly Strickland. They talked on the phone, and Donaldson agreed to go to a motel where they exchanged a bag of marijuana for some crack cocaine. V29T1538-39. Cisneros got paged to see somebody on "the island." Donaldson didn't want to go, so Cisneros and Wengert took him to a lady friend's house. He smoked marijuana with her until they came back to get him with

some beer 1½-hours later. V29T1539-40. They returned to the house where Straham was talking on the phone. Straham left to see woman, but she didn't show, so he returned and they all went to the mall. They returned home after nightfall, resuming their drinking and marijuana smoking. V29T1540-41.

Campbell had been paging Donaldson all day but he refused to answer because he was having problems with her father, Tommy Gainer. Nonetheless, Campbell paged him again, and he returned the call. V29T1541-42. He told Campbell she shouldn't be calling because he's already having enough trouble with his girlfriend in that females had been calling and hanging up. She said she wanted to know what he was up to and how many people were with him. He told her not to call his house "playing," and he hung up. She called right back, didn't say anything, and this time she hung up. V29T1543-45. There was no mention of her being pregnant, and he had not been "messing" with her. There was also nothing said about her standing out by the side of the road so he could come by and shoot her. V30T1618-21.

Later, Tommy Gainer called and accused him of harassing his daughter. Donaldson denied it and said she should not be calling his house. Gainer then referred to an incident that happened at the Marina Bay. In that incident, Donaldson said he had been drunk in one of the bedrooms when Gainer came in the kitchenette tried to get into the bedroom. Cisneros and Wengert, however, stopped Gainer at gunpoint, and Gainer was still miffed about it. Donaldson said that was between the three of them, and he should talk to Wengert. Wengert got on the phone and was talking to

Gainer when the phone went dead. V29T1545-47.

The phone had gone dead like that before, and Donaldson immediately became suspicious. He went toward the back bedroom to look out the window to see if the line had been cut, but he couldn't tell. He looked on the side of the house to see if anybody was there and he met up with Cisneros who was coming from the kitchen. Cisneros said Head was at the door and asked if he should let him in. Donaldson told him no because he believed Head had something to do with a prior robbery when the phone line had been cut, and he thought this might be yet another robbery. Straham, Donaldson, Cisneros, and Wengert went out to see who was there. V29T1547-49.

Donaldson walked up to Head and said, "'What's up, man, what you want?'" Cisneros and Wengert approached Head from the other side, and Head looked surprised. Donaldson said they thought he was "'with that jack,'" and Head said he had nothing to do with it, he just wanted to "'holler at you.'" "Holler" means talk. V30T1624. Donaldson said he wanted to "holler" at Head too. V29T1549-50. They walked toward the back of the house because the front door was still locked. Donaldson said he wanted to talk to Head, and Head said he had been unable to reach Donaldson by pager all day. They sat down in the livingroom when Head revealed that Campbell had brought him there. She knew Donaldson had fronted drugs to people, and Head was hoping he would front drugs to him so he could deal on the street. V29T1549-50.

He never pulled a gun on Head, although Head and Wengert had a bit of an argument and Wengert pulled out a gun to be macho.

"I never told any one of them to act any way, you know. When Joey did that I took the gun from him and told him, 'Ain't going to be none of that, just calm down, there ain't going to be none of that.' I took the gun from him, I took the clip out and put the gun -- put the clip in my pocket and put the gun up under the pillow up under the couch where I was sitting at." V29T1550-51.

While this was going on, Campbell was standing outside. Head said she didn't want to come to the door because she didn't know if Donaldson's girlfriend was there, and she wanted to avoid a fight. Head suggested they get Campbell because she could clarify the Marina Bay Motel situation. At Head's urging, he told the others to bring in Campbell. They did. "If she was kidnapped and all that, I don't know, if she was forced in," Donaldson said. V29T1551-52.

Donaldson asked Head about the robbery. Head explained that he had nothing to do with the robbery, and Campbell had never said anything about robbing him. Wengert did not accept the answer and began questioning him. Campbell came in and told Donaldson she had never said Head had robbed him, only that Head might know something about it. Donaldson said he thought she was lying, trying to instigate something, but they discussed it some more and things calmed down. V29T1553-54, V30T1621, V30T1623.

Donaldson never heard Campbell say anything like "Am I going to die?" It may have been said to somebody else elsewhere in the house, but he wouldn't know. "[A]ll I know is when I was in the livingroom area and we were talking, it wasn't that type of hype, it wasn't that atmosphere, it wasn't like that." V30T1625.

During the conversation, neither Campbell nor Head admitted that they tried to rob him. V30T1624. The two could have left any time they wanted to. V30T1621.

At some point Cisneros assaulted Campbell after she made a statement to Straham about Cisneros liking her or trying to mess with her, and Cisneros overheard that, got angry, and kicked her. Donaldson told them to break it up. V30T1621-22

Sykosky paged Donaldson, and Donaldson called back. Sykosky wanted to buy crack, so Donaldson sent Cisneros and Wengert to pick him up. He had fronted drugs to Sykosky before. When they returned, Straham, Head, Campbell, and Donaldson were sitting around, talking. Wengert showed Sykosky to the leaving room. Sykosky looked at Head, recognized him, and confronted Head about a time Head sold him some "'trash,'" bad drugs, but Head denied he had every met Sykosky before. V29T1554-56, V30T1616. Donaldson asked Sykosky if he was sure, and Sykosky said, "'I know that punk.'" Head got upset and stood up.

> [DONALDSON]: As Donnta stands up out of the chair the music turns on, and it was simultaneously, just as soon as Donnta stands up the music just comes on real loud.
> Q Where's Joey?
> A He's in the kitchen. I don't know if he pushed the mute button and had the stereo all the way turned up, but as soon as Donnta stands up, Joey pushes that mute button and simultaneously that's when Sykosky looked back and Donnta was stepping up on him and Sykosky pulls out a gun and he starts shooting.

V29T1556-57, see also V30T1627-28. Donaldson and Cisneros ran toward the kitchen through the bamboo curtain when the gun started firing. V29T1557-58, V30T1628.

> [DONALDSON]: [N]obody in that house knew that Sykosky was going to do what he did, you know. I didn't know

that those kids were going to die, you know. No, I did not order it, you know, and like they got up on the stand and said they were begging for their lives, this and that. Those kids did not even know, that's a lie, you know.
Q Did you know?
A Nobody in that house knew other than the person that gave Sykosky that gun, and I did not give him that gun, you know.
Q Okay. And your gun was under the pillow with your clip in your pocket?
A No, I didn't have a gun at the time. The gun that Joey had, that he was threatening Donnta with, I had took the gun from him because I felt like there wasn't going to be none of that in my house.

V29T1557-58. Sykosky shot Head and Campbell, V29T1558, and helped clean some of the blood, V30T1629. Donaldson also had Wengert and Cisneros help clean Donaldson's house. V30T1630-31.

Sykosky did not owe Donaldson any money when he came by the house that night. Donaldson had fronted Sykosky drugs but Sykosky paid him off earlier in the day and came over with $300 to buy more drugs. V29T1558.

Donaldson did not ask Sykosky why he murdered the two victims. V30T1629. Donaldson was shocked by the shootings and at first did not say anything because he did not want to get shot himself. The next thing he remembered, Sykosky said something to Cisneros, and "the bodies are being dragged out." Donaldson did not help take the bodies out of the house, but he did help take the bodies out of the car and helped remove their clothes. V29T1559. In all, Head and Campbell had been in the house for about two hours. V30T1622.

Some time after the homicides, Donaldson went to Texas because he was afraid that things had gotten out of hand. He and Sheila previously discussed marriage, moving to Texas, and giving

up the drug business, but the money was addictive. While in Texas, however, he and Sheila married, and they had a child on the way. They thought Donaldson turning himself in would be better than running. They called Melissa Woods and asked her to meet them at the bus station so he could turn himself in. He voluntarily returned to Florida three days after the killings. V29T1444-47, V29T1584-86. He initially told an investigator he didn't know about the murders because he was afraid for his life and his family. V29T1586, V30T1612-14. "Sykosky had killed those kids and if I snitched on him it was very likely he could have killed somebody in my family to get back." V29T1586.

Asked if he accepted the jury's judgment, he said,

> I accept it to the degree as I feel like well, maybe if I hadn't been living the lifestyle I was living, maybe if I hadn't been dealing with drugs and this and that, you know, maybe none of this would have never happened, you know. I accept it to that degree, but to say that I gave, you know, Sykosky the gun and ordered him to kill them, I did not do that. I did not know that those kids were going to be killed, you know. I'm sorry to the family, you know, the way that Wenger[t] has told this story, man, he's added the lie with the truth, you know. A lot of things that he's saying is true, but a lot of things he goes back -- is lies, man, to protect hisself, you know.

V29T1560. He adamantly persisted that he did not kill Head and Campbell, and he did not order their deaths, although he admitted he helped dispose of their bodies. He further did not understand that they had been kidnapped: Head came in voluntarily, and he had no knowledge that Campbell was brought in against her will. V29T1588-91. He said having been robbed did not give him a reason to kill because he had been robbed many times, and that was just part of the price for living that life style. V30T1631.

The conduct at issue also had been prosecuted in federal court. He was convicted of conspiracy to possess with intent to distribute cocaine base, possession of a firearm during and in relation to a drug trafficking crime, and possession of a weapon by a convicted felon. He was sentenced to life imprisonment plus a consecutive 60-month sentence and a 120-month concurrent sentence. V29T1574-75, V29T1587, V30T1610.[5]

The defense tried to introduce the fact that Donaldson had turned down the state's plea bargain for a life sentence, but the judge sustained the state's objection. V29T1575-83.

At the close of evidence, Donaldson introduced the plea agreement Cisneros struck February 8, 1996. Cisneros pleaded no contest to two manslaughter charges in exchange a 12-year-sentence recommendation. The State then introduced the prosecutor's motion to withdraw that plea agreement because Cisneros lied in his deposition. V30T1635-37.

4. Additional evidence heard only by the judge

On May 22, 1996, the judge held a sentencing hearing[6] in which he denied Donaldson's motion for a new trial, V15R2950-52, V14R2684-89, and heard additional testimony and argument.

Wengert testified again for the State. V15R2952. He said Head and Campbell were somewhat paranoid, wanting and begging not to be killed and repeatedly asking if their lives were in danger.

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[5] The undersigned has been advised that the federal judgment and sentence were affirmed on appeal. Case No. 95-3441 (11th Cir. Sept. 20, 1996) (unpublished order).

[6] See Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993).

They showed signs of distress and appeared nervous. Things calmed down, however, and Head even drank a beer with the guys after admitting he tried to rob Donaldson. They were told they would not be killed. V15R2953-56, V15R2976-77. Throughout the episode, Wengert believed they were not going to be killed. V15R2977. Donaldson did not beat Campbell. V15R2974-75.

Wengert claimed that when Sykosky came in, he walked into the living room, asked if this is what he wanted him to do, and Donaldson handed him the weapon. He said Head and Campbell were crying and asking not to be killed, V15R2962, but he did not give that testimony in Sykosky's trial, V15R2977. Wengert did not know right off what he was talking about until Sykosky got the gun. V15R2966-67. The gun required a clip and needed to be cocked to fire, but Wengert did not see if it already had been cocked. V15R2971-72. Donaldson said hold on and told Wengert to turn up the stereo. Afterward, Donaldson told him to turn back and turn it up again, and that's when the shots were fired. V15R2957-62. "[I]t all happened so quick they didn't have a chance to say nothing," Wengert said. V15R2965. The first shots went through the head and the rest were through the bodies. V15R2965-66. However, even the prosecutor noted this story was different from his earlier testimony when Wengert could not remember where the first shots were fired. V15R2966, V15R2979.

Wengert said he overheard Donaldson's telephone conversation with Sykosky, but he admitted he only heard parts of it because he was busy drinking and getting more booze. He said he heard some discussion about Sykosky wanting to go to California, but he

wasn't sure it that was even the same conversation, for it could have happened on another night. V15R2967-70, V15R2980.

Wengert saw no money or drugs exchanged by Donaldson and Sykosky. V15R2973. After the incident, however, Wengert claimed Donaldson said something to Sykosky about clearing his debt, purportedly a thousand dollars or more, V15R2973-74, a fact he had never testified to before, V15R2980. He also claimed he merely asked "a question," which the judge noted was contrary to Straham's testimony that Wengert was the interrogator. V15R2975.

Wengert claimed within an hour before Sykosky showed up that night, Donaldson had asked Wengert to shoot the victims. Wengert said he refused because he didn't have any problem with them. The court asked how could he have testified he didn't think anyone would be killed when he had been asked to kill them himself. Wengert said "I didn't know if he was serious or if he was just trying to see whether or not I would do it or if he was joking or what. I didn't know whether to take him serious or not." He never saw Cisneros being asked to kill, either. V15R2981-83.

Over objection, the court permitted the State to introduce Cisneros's deposition. V15R2984-90, V12R2254-2340. The defense agreed to the introduction of the testimony recorded in Sykosky's trial. V15R2991-92, V16R3021-V21R4200. In that trial, which ended earlier in May after Donaldson's jury proceedings concluded, Sykosky was convicted of two counts of first-degree murder and two counts of aggravated child abuse. V21R4016-20. He got two consecutive life terms plus two concurrent fifteen-

year terms. V21R1175-77.

5. Sentencing

The judge found five separate enumerated aggravating circumstances as to each capital count: (1) "The Defendant was previously convicted of another capital offense," specifically, the contemporaneous murders, V14R2751, V14R2790, V16R3006[7]; (2) "The Defendant was previously convicted of a felony involving the use or threat of violence to some person, to-wit: the Defendant's January 8, 1992, conviction of Accessory after the Fact to Second Degree Murder," V14R2751, V14R2790, V16R3006-08[8]; (3) The murders were committed during a kidnapping, V14R2751-52, V14R2790-91, V16R3008[9]; (4) Both murders were cold and calculated and premeditated without any pretense of moral or legal justification (CCP), V14R2752-53, V14R2791-92, V16R3008-10[10]; and (5) Both murders were committed in an especially heinous, atrocious, or cruel manner (HAC), V14R2753, V14R2792, V16R3010-11[11].

As to mitigation, the judge found nonstatutory mitigation in (1) Donaldson's "good prison record," giving it "some weight," V14R2756, V14R2795, V16R3015; (2) Donaldson's distressed state of mind regarding his own safety and the safety of his family, giving it "slight weight," V14R2756, V14R2795, V16R3016;

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[7] § 921.141(5)(b), Fla. Stat. (1993).

[8] Id.

[9] Id. § 921.141(5)(d).

[10] Id. § 921.141(5)(i).

[11] Id. § 921.141(5)(h).

(3) Donaldson's family background and traumatic circumstances surrounding his childhood and formative years, giving it "slight weight," V14R2756-57, V14R2795-96, V16R3016; and (4) Donaldson's capacity for hard work and his good work record when employed, giving it "slight weight," V14R2757, V14R2796, V16R3017.

The judge gave "little, if any, weight" to the nonstatutory mitigator that the triggerman, Sykosky, merely got a life sentence, and the other defendants all got lesser or no sentences. V14R2755, V14R2794, V16R3013-15.

The judge expressly rejected two statutory mitigators: (1) Donaldson was an accomplice in the offense but the offense was committed by another person and Donaldson's participation was relatively minor, V14R2754, V14R2793, V16R3012[12]; and (2) Donaldson's youthful age of 21, V14R2754, V14R2793, V16R3012[13].

The judge expressly considered and rejected the following nonstatutory mitigation: (1) Disparate treatment of co-defendants and other participants, particularly William Straham, V14R2755-56, V14R2794-95, V16R3015; (2) The circumstances of this case including the level of quality or credibility of certain witnesses, V14R2756, V14R2795, V16R3015; (3) Donaldson already is serving life in the federal correctional system, V14R2756, V14R2795, V16R3015; (4) Donaldson attended church regularly with his family while growing up, was very talented, and played the organ and would sing in church, V14R2757, V14R2796, V16R3017; and

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[12] Id. § 921.141(6)(d).

[13] Id. § 921.141(6)(g).

(5) Donaldson's "good qualities," which were "best exemplified by his moving to Georgia to take care of his invalid grandparents," V14R2757, V14R2796, V16R3017.

SUMMARY OF THE ARGUMENT

I: The court reversibly abused its discretion by denying Donaldson the right to testify on his own behalf as the sole defense witness in the guilt phase of the trial after Donaldson revoked his waiver of the right to testify before the jury was charged. United States v. Walker; Steffanos v. State.

II: Material contradictions by the State's two pivotal witnesses in the guilt phase failed to establish guilt beyond a reasonable doubt as to any of the convictions. Majors v. State; Sirmons v. State.

III: The whole penalty weighing process was skewed by a series of errors stemming from the court's decision that permitted the State to introduce detailed evidence of a prior crime for which Donaldson was not convicted to prove a prior violent/capital felony conviction. Dougan v. State. Donaldson had been convicted of accessory after the fact, which Florida law defines as a wholly distinct nonviolent crime. Staten v. State. Yet at the State's urging, the cosentencers found the accessory after the fact conviction was really a principal to murder conviction. That constituted nonstatutory aggravation. Hitchcock v. State. This collateral crime impermissibly became the sole feature of the penalty phase. Finney v. State.

The court double-counted the factor at the State's urging. Cosentencers erroneously counted and weighed the contemporaneous

murder in each count as a prior capital felony, and separately counted and weighed in each count the accessory conviction as a prior violent felony, even though both constitute one statutory aggravator. Provence v. State. The State's argument urging cosentencers to double-count constituted prosecutorial misconduct. Garcia v. State. The double-counting error was compounded by the judge's refusal to give the doubling instruction. Castro v. State.

The court permitted the State to present substantial hearsay to prove this factor even though the evidence was irrelevant, unduly prejudicial, and Donaldson had no fair chance to rebut it. Hitchcock v. State; Rhodes v. State; Duncan v. State.

IV: The court erred by permitting the State to rely on the discovery deposition of a non-testifying codefendant in penalty proceedings even though it was irrelevant, unduly prejudicial, and provided no fair chance for rebuttal. Green v. State; Rhodes v. State; Old Chief v. United States.

V: HAC is unconstitutional facially, as instructed, and as applied. The statute and instruction are vague and over broad. Maynard v. Cartwright. The factor was not proved beyond a reasonable doubt, especially when compared with other cases where the factor was not proved. Maharaj v. State; Bonifay v. State; Robinson v. State.

VI: CCP is unconstitutional facially, as instructed, and as applied, especially here where a material element of the standard pretense definition was omitted over objection. The instruction given failed to tell jurors a pretense would negate CCP entirely

by rebutting heightened premeditation. The instruction also is vague and over broad. Maynard v. Cartwright; Rojas v. State, Anderson v. State, Motley v. State. The factor was not proved beyond a reasonable doubt because evidence established a pretense of moral or legal justification. Banda v. State; Cannady v. State; Christian v. State.

VII: Because the evidence was insufficient to support the armed kidnapping charge, the aggravator for murder committed during an armed kidnapping must be vacated. Johnson v. Mississippi.

VIII: Multiple errors were committed regarding mitigation. The court refused to permit Donaldson to testify he had turned down the State's plea offer for a life sentence to support his contention that he was a relatively minor accomplice to Sykosky's murderous act. Special instructions for nonstatutory mitigators were refused. The judge ambiguously gave "little or no weight" to the lesser treatment of every accomplice, and declined to consider altogether Straham's absolution. The judge failed to find as mitigating Donaldson's good qualities and specific acts of humanitarian deeds, and that he will never be freed from prison due to his federal life sentence and the life sentences that would be imposed here. The judge failed to even consider Donaldson's history of drug abuse, his attempted suicide, and his consumption of drugs and alcohol all day immediately preceding the murders. Lockett v. Ohio; Simmons v. South Carolina; Campbell v. State.

IX: The death sentences were disproportionate in light of the mitigation, especially when taking into account that numerous

aggravators should not have been found. Slater v. State.

X: At sentencing the court failed to file written reasons for departure regarding the noncapital sentences. The sentences must be vacated and Donaldson must be resentenced within the guidelines. Gibson v. State; Owens v. State.

ARGUMENT

I: WHETHER THE TRIAL COURT DENIED DONALDSON HIS CONSTITUTIONAL RIGHT TO TESTIFY IN THE GUILT PHASE.

At the close of evidence in the guilt phase, the defense rested without putting on evidence. V27T1040. After the charge conference, Donaldson stated on the record he would go along with counsel's decision and would waive his right to testify. V27T1069-71. The court recessed for the day after closing arguments, and when court resumed, Donaldson asserted his right to testify. The judge refused on the ground that he knew of no procedure permitting him to reopen the case. V27T1169-70.

The accused has an absolute, fundamental right to testify on his own behalf in a criminal trial, a right guaranteed by "several provisions of the Constitution." Rock v. Arkansas, 483 U.S. 44, 51 (1987); amends. V, VI, XIV, U.S. Const.; art. I, §§ 9, 16, Fla. Const. Even though Donaldson initially had waived his right, the jury had not yet been instructed. Donaldson had made no attempt to disrupt these proceedings or to improperly seek their delay, and no prejudice was asserted by the State. The judge simply could have reopened the case to permit Donaldson to testify, thereafter giving the State the right to put on rebuttal evidence, followed by closing arguments.

The judge erred in finding he had no procedure available, for many courts in Florida and other jurisdictions have approved such a procedure. Those cases hold a trial court reversibly abuses its discretion when its refusal to reopen the case denies the accused his right to testify or to introduce other highly relevant evidence, because presenting that evidence would serve the best interests of justice and would prevent the jury from being deprived of evidence that might have a significant impact on its determination. For example, in United States v. Walker, 772 F.2d 1172 (5th Cir. 1985), the Court reversed for a new trial when the judge refused to reopen to permit Walker to testify.

> Walker's testimony in his own defense is of such inherent significance that the district court, as a matter of fairness, should have permitted him to testify. Walker had not testified at all, and his testimony would be of particular interest to the fact finder because he would be testifying as the alleged active participant in the activities which were the focus of the trial. Where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance.

772 F.2d at 1178-79. See also Steffanos v. State, 80 Fla. 309, 86 So. 204 (1920) (reversing because accused denied opportunity to put on reputation evidence going to heart of defense); Delgado v. State, 573 So. 2d 83 (Fla. 2d DCA 1990) (reversing because court refused to reopen case after both sides rested to permit accused to present self defense evidence); cf. State v. Ellis, 491 So. 2d 1296 (Fla. 3d DCA 1986) (reversing for failure to reopen suppression hearing to admit crucial prosecution evidence). When Donaldson ultimately did testify in the penalty phase, he presented a compelling depiction of the events that

night, materially refuting the State's self-contradictory evidence of Wengert and Straham. As in Walker, the jury was deprived of evidence that might have had a significant impact on its determination. The judge abused his discretion in denying this capital defendant his first and only request to testify in the guilt phase where his evidence would have been the entire defense, denying him perhaps the most fundamental right of all.

II: WHETHER CONTRADICTORY EVIDENCE PREDICATED ON TESTIMONY OF ADMITTED LIARS WAS SUFFICIENT TO SUSTAIN CONVICTIONS OF KIDNAPPING, AGGRAVATED CHILD ABUSE, AND FIRST-DEGREE MURDER.

Donaldson was charged with two counts of armed kidnapping under section 787.01(1)(a)(3), Florida Statutes (1993). The jury had to find that he forcibly or secretly or by threat confined, abducted, or imprisoned the victims against their will, without lawful authority, and with the intent to inflict bodily harm upon or terrorize them. V13R2525; see Bedford v. State, 589 So. 2d 245, 251-52 (Fla. 1991), cert. denied, 503 U.S. 1009 (1992). The facts do not support all of those elements beyond a reasonable doubt. Head and Campbell came to Cape Drive voluntarily. The State put on contradictory evidence about whether they were brought into the house under any threat or force, Straham saying there had been none, Wengert saying otherwise. There was nothing secret, either, for Head and Campbell simply came to the house walking on the public streets and neither Donaldson nor the others took them anyplace or otherwise attempted to secrete them or insulate them from contact with the outside world. They were not bound, tied, blindfolded or gagged. There is no evidence

they asked to leave and were denied that right. There is no evidence anybody blocked the doorway. There is no evidence Donaldson had formed the intent to terrorize them, as he, Wengert, and Straham all assured Campbell and Head they would not be killed. And the State's own evidence was self-contradictory over whether Donaldson had ever formed an intent to cause harm: Wengert said he saw such intent, and Straham saw none. Under due process, a conviction cannot be sustained when the State's own witnesses contradict each other as to the existence of an essential element, e.g. Majors v. State, 247 So. 2d 446 (Fla. 1st DCA), cert. denied, 250 So. 2d 898 (Fla. 1971), and the evidence was rife with such contradictions.

Donaldson also was charged with aggravated child abuse under sections 827.03(1)(a) and (b), Florida Statutes (1993). The State was required to prove he either wilfully tortured these victims by knowingly, intentionally, and purposely causing pain or suffering unnecessarily or unjustifiably, section 827.03(1)(a); or he intentionally committed an aggravated battery upon them by committing a battery with a deadly weapon or intentionally or knowingly caused them great bodily harm, section 827.03(1)(b). As before, there is no evidence that Donaldson intended to torture Head and Campbell, and there is no evidence they suffered pain other than that inherent in the deaths themselves, which is not the kind of pain and suffering contemplated by this statute. The only aggravated battery allegedly committed by Donaldson was the homicide itself. On these facts, both the aggravated child abuse and the homicide

constitute degree variants of the same core act of aggravated battery, and Donaldson cannot be convicted and punished of both. § 775.021(4)(b)2., Fla. Stat. (1993); see Thompson v. State, 650 So. 2d 969 (Fla. 1994) (reversing dual convictions of sexual battery on incapacitated victim and sexual battery while in custodial authority of child); Sirmons v. State, 634 So. 2d 153 (Fla. 1994) (reversing dual convictions of robbery of weapon and grand theft of automobile); Godwin v. State, 634 So. 2d 157 (Fla. 1994) (reversing dual convictions of UBAL manslaughter and vehicular homicide).

Because these underlying felonies were not established, felony murder was not proved. That leaves premeditated murder, and here again the State's self-contradictory proof cannot sustain the first-degree judgment. Majors. Wengert said Donaldson ordered Sykosky to commit the murders, but Straham, who was right there, said no such order was given and that Donaldson appeared shocked. The State's own evidence establishes a reasonable hypothesis of lack of premeditation. Given the self-contradictions in the State's sole evidence on these pivotal points, the State has not excluded the hypothesis that Sykosky acted on his own when he came there to buy drugs, as he had before. Consequently, all the convictions should be vacated.

III: WHETHER THE ERRONEOUS INTRODUCTION AND FEATURING OF A PRIOR CONVICTION FOR ACCESSORY AFTER THE FACT, COMBINED WITH IMPROPER PROSECUTORIAL ARGUMENT, FAILURE TO INSTRUCT, AND IMPROPER JUDICIAL FINDINGS, GAVE UNLAWFUL CONSIDERATION TO NONSTATUTORY AGGRAVATION AND DOUBLE CONSIDERATION TO THE PRIOR VIOLENT/CAPITAL FELONY AGGRAVATOR, THEREBY SKEWING THE WEIGHING PROCESS IN VIOLATION OF DONALDSON'S RIGHTS.

Section 921.141(5)(b), Florida Statutes (1993), requires the State to prove "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." The State began the penalty phase already having established that one aggravating circumstance by virtue of the convictions obtained in the guilt phase for the contemporaneous kidnapping and murder of two separate persons. Donaldson conceded as much. V14R2711-12. Nonetheless, the State presented nearly a whole volume of testimony -- totally dominating its penalty phase case -- to prove that Donaldson's prior felony conviction as an accessory after the fact in the June 1991 death of Paul Alan Mahugh, an unrelated murder committed by another person, was in actuality a conviction for principal to second-degree murder. The prosecutor then argued to the jury and the judge that the contemporaneous murder convictions and the Mahugh accessory conviction constituted two separate, enumerated, independent aggravating circumstances as to each murder in this case even though the statute expressly established but one circumstance. At the State's urging, the judge found two separate aggravating circumstances under this one statute, applied the two to the two murder counts, and doubly weighed them against Donaldson.

The court erred by admitting evidence of a conviction that constitutes nonstatutory aggravation. The court erred by admitting irrelevant and hearsay evidence for which Donaldson had no opportunity to rebut. The court erred by permitting the collateral crime to become the sole feature of the penalty phase.

The court erred by finding and weighing nonstatutory aggravation and by erroneously doubling the prior violent/capital felony aggravator at the State's urging. These errors, individually and cumulatively, violated Donaldson's state and federal rights to due process, equal protection, a fair sentencing proceeding, and his protections against double jeopardy and cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

A. All accessory after the fact evidence was inadmissible.

The introduction of all of the evidence concerning the accessory after the fact conviction, its applicability, the instructions, and the findings were consistently and repeatedly objected to on a variety of grounds before, during, and after trial, V13R2576 (motion in limine), V14R2631 (motion in limine), V14R2684-89 (motion for new trial), V15R2950-51 (May 22 hearing), V28T1203-24 (pre-penalty phase motions hearing), V30T1652-56 (charge conference), as well as additional contemporaneous evidentiary objections made throughout the penalty phase, V28T1241-49, V28T1229-33, V28T1287-89, V28T1365-67. Introduction of the evidence was prejudicial error on a variety of grounds.

1. Evidence of a conviction for accessory after the fact does not qualify as a prior violent felony conviction.

None of the evidence relating to the Mahugh incident was admissible against Donaldson because an accessory after the fact conviction is not, as a matter of law, a prior violent crime within the meaning of section 921.141(5)(b). Lewis v. State, 398 So. 2d 432 (Fla. 1981), held that to qualify under this statute

prior convictions are limited to "life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Subsequently, this Court has held that certain criminal convictions for substantive conduct committed upon another are, on the face of the definition of the convicted offense, convictions of violent crimes, whether the felon personally committed the act of violence, e.g., Lockhart v. State, 655 So. 2d 69 (Fla.)(murder), cert. denied, 116 S.Ct. 259 (1995); Padilla v. State, 618 So. 2d 165 (Fla. 1993) (manslaughter), or was convicted as a principal to another's violent act, see Hoffman v. State, 474 So. 2d 1178 (Fla. 1985) (principal to second-degree contemporaneous murder where codefendant was actual killer). Some other prior convictions, by the way the convicted crimes are legally defined, are ambiguous as to whether they involved violence, and for those prior convictions the State is permitted to put on evidence in the penalty phase to prove they were in fact crimes of violence. See Sweet v. State, 624 So. 2d 1138 (Fla. 1993) (possession of firearm by convicted felon); Preston v. State, 531 So. 2d 154 (Fla. 1988)(throwing deadly missile into occupied vehicle); Johnston v. State, 497 So. 2d 863 (Fla. 1986) (battery on law enforcement officer and terroristic threat); Brown v. State, 473 So. 2d 1260 (Fla.)(arson), cert. denied, 474 U.S. 1038 (1985); Johnson v. State, 465 So. 2d 499 (Fla. 1984)(burglary), cert. denied, 474 U.S. 865 (1985); Mann v. State, 453 So.2d 784, 786 (Fla. 1984) (unnatural carnal intercourse and burglary with intent to commit same), cert. denied, 469 U.S. 1181 (1985); Simmons v. State, 419 So. 2d 316

(Fla. 1982) (strong-armed robbery); White v. State, 403 So. 2d 331 (Fla. 1981) (assault with intent to commit rape), cert. denied, 463 U.S. 1229 (1983).

But accessory after the fact is unique. Florida law has defined accessory after the fact to preclude it from ever being considered the violent offense of principal to murder because the Legislature defined accessory after the fact as a separate crime wholly independent of the principal's collateral, violent crime. In Staten v. State, 519 So. 2d 622 (Fla. 1988), this Court recognized the substantial distinction between principal and accessory after the fact to the same criminal conduct. See also Brown v. State, 672 So. 2d 861 (Fla. 3d DCA 1996).[14] Principal to a crime physically committed by another requires proof beyond a reasonable doubt the defendant specifically intended that particular crime be committed before it occurred.[15] Accessory after the fact requires a "mutually exclusive" intent, proof that after the defendant knew a crime was completed, he gave

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[14] Principal includes the former crimes of principals of all degrees and accessory before the fact, but not accessory after the fact. State v. Dene, 533 So. 2d 265 (Fla. 1988); Potts v. State, 430 So. 2d 900, 902 (Fla. 1982).

[15] Principal at the time of the Mahugh incident was defined by section 777.011, Florida Statutes (1989), as

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

assistance with the intent to avoid or escape detection, arrest, trial or punishment.[16] Staten, 519 So. 2d at 625. Accessory after the fact is a totally different crime from the substantive wrongdoing, and the accessory is treated not as a participant in that crime but as an "actor in a separate and independent crime, obstruction of justice." Staten, 519 So. 2d at 626. As a matter of state law, one who was convicted of accessory after the fact cannot also have been a principal to the same conduct. Staten, 519 So. 2d at 625-26. Accordingly, an accessory after the fact to an already completed crime is not and cannot be held either legally or morally responsible for the completed crime irrespective of the gravity or violence of that offense, and the accessory faces lesser punishment. Staten, 519 So. 2d at 626.

Florida law prohibits the State from introducing evidence of a crime for which the defendant was not convicted to prove this aggravating circumstance. E.g. Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985) (error to introduce evidence of nolle prossed charge), cert. denied, 475 U.S. 1098 (1986). Yet jurors were

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[16] Accessory after the fact in Mahugh's death was defined by section 777.03, Florida Statutes (1989), as

> Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he had committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775,083, or s. 775.084.

told to find Donaldson guilty of being a principal to second-degree murder, V14R2673-74, V30T1715-16, V30T1671, a crime for which he was not convicted as a matter of law, Staten, and for which the State had not carried the same requisite burden of proof in 1991.

Other legislation supports the conclusion that lawmakers did not intend an accessory after the fact conviction to be considered a violent crime for the purposes of enhancing punishment. In section 775.084(1)(b)1., Florida Statutes (1993), the Legislature enumerated crimes of violence as those deserving of habitual violent offender punishment enhancement in much the same way the Legislature in section 921.141(5)(b) chose to use prior crimes involving violence to enhance punishment of capital murder. Section 775.084(1)(b)1. defines violent offenses as the commission of, the attempted commission of, or the conspiracy to commit arson; sexual battery; robbery; kidnapping; aggravated child abuse; aggravated assault; murder; manslaughter; unlawful throwing, placing, or discharging of a destructive device or bomb; armed burglary; or aggravated battery. As broad and specific as that collection of violent crimes is, the Legislature chose to exclude the independent crime of accessory after the fact. Reading these similarly motivated statutes in pari materia, along with the principle that the expression of one thing implies exclusion of another, e.g., Moonlit Waters Apts., Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996) (expressio unius est exclusio alterius), shows that the Legislature did not intend accessory after the fact to be counted as a prior violent felony.

Even if there is doubt, all doubts must be resolved in favor of the accused as a matter of statutory construction and due process of law under the rule of lenity, Perkins v. State, 576 So. 2d 1310 (Fla. 1991), especially under the Florida Constitution, where due process affords greater protection, Haliburton v. State, 514 So. 2d 1088 (Fla. 1987).

The plea agreement does not change this analysis. The State in 1991 elected not even to attempt to carry its beyond-a-reasonable-doubt burden to prove a violent crime, choosing instead to accept a lesser conviction of a nonviolent crime. Perhaps the State could have convicted him of principal, and perhaps not, but the State made its bargain and is bound to accept its consequences, just as defendants are expected to do. As the United States Supreme Court recently made clear,

> In both the civil and criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and powerful, but also the indigent engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment.

Lynce v. Mathis, 117 S. Ct. 891, 895 (1997) (citation omitted). The State should not now be permitted to go through the back door years later to prove a crime it had a chance to prove but bargained away, a bargain on which Donaldson detrimentally relied. Due process fundamental fairness, collateral estoppel, and double jeopardy principles also forbid this.

This impermissible collateral crimes evidence amounted to nonstatutory aggravation, which has long been held to be highly prejudicial and unconstitutional. See, e.g., Hitchcock v. State,

673 So. 2d 859, 861 (Fla. 1996); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Derrick v. State, 581 So. 2d 31 (Fla. 1991).

2. Even if generally admissible, much of the evidence was inadmissible because Donaldson had no fair, meaningful opportunity to rebut it, it was irrelevant, or it was unduly prejudicial.

The State is prohibited from introducing evidence in a capital penalty proceeding that does not tend to prove a material fact in issue. E.g., Hitchcock, 673 So. 2d at 861 (barring admission of evidence of sexual crimes committed upon juvenile sister of murder victim because it was irrelevant to any material fact in issue); Mendyk v. State, 545 So. 2d 846 (Fla.) (titles of pornography recovered from Mendyk's home were irrelevant), cert. denied, 493 U.S. 984 (1989); § 90.402, Fla. Stat. (1993). Even if relevant, the evidence must not be cumulative or unduly prejudicial. E.g., Duncan v. State, 619 So. 2d 279, 282 (Fla.) (undue prejudice caused by introduction of photo of collateral murder victim when collateral crime had been proved through judgment and officer's testimony), cert. denied, 510 U.S. 969 (1993); Mendyk; § 90.403, Fla. Stat. (1993). Hearsay evidence is inadmissible unless the defendant had a fair, meaningful opportunity to rebut the hearsay and his confrontation rights were not violated, E.g., Rhodes v. State, 638 So. 2d 920, 924 (Fla.) (error to permit testifying witness to refer to hearsay document, even though defense had cross-examined the witness in court, because defense had no fair opportunity to rebut the document), cert. denied, 115 S. Ct. 642 (1994); Dragovich v. State, 492 So. 2d 350, 355 (Fla. 1986) (evidence of reputation

barred because reputation evidence does not provide defendant fair opportunity to rebut); § 921.141(1), Fla. Stat. (1993)[17]. The judge permitted the State to repeatedly violate these rules in proceedings before the jury.

All of the State's evidence of its prime witness to the 1991 incident, Kasten, came in over objection as hearsay for which Donaldson had no fair and meaningful opportunity to rebut. V28T1241-49. The bulk of Kasten's evidence took the form of his September 26, 1991, discovery deposition, State Exhibit 23, which was also read to he jury, V28T1290-1331. The deposition itself shows that it had been taken by Nickolas G. Petersen on behalf of Schrolf Barnes, and was defended by prosecutor Fleet. Chris Saxer, Donaldson's attorney both in 1991 and now, made no appearance at that 1991 deposition.[18] Saxer also said he had no notice, and the State presented no evidence that he had.

Moreover, a discovery deposition is not admissible as substantive evidence generally because it does not provide a fair, meaningful opportunity to rebut the testimony. This Court

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[17] Section 921.141(1), Florida Statutes (1993), provides in relevant part that

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

[18] Copies of the first two pages of the deposition, revealing who appeared, are appended to this brief as A10-11.

recently held in State v. Green, 667 So. 2d 756 (Fla. 1995), that discovery depositions are unique and perform a particular function that is disserved by allowing a party to introduce the deposition as substantive proof of any fact.

> How a lawyer prepares for and asks questions of a deposition witness whose testimony may be admissible at trial as substantive evidence under rule 3.190 is entirely different from how a lawyer prepares for and asks questions of a witness being deposed for discovery purposes under rule 3.220. In effect, the knowledge that a deposition witness's testimony can be used substantively at trial may have a chilling effect on a lawyer's questioning of such a witness.

667 So. 2d at 759. Here, neither Donaldson nor his counsel were present at the deposition, so surely they had no adequate opportunity to rebut it. Barnes's lawyer took the deposition so he was not even attempting to rebut the evidence; he was seeking information and trying to merely lay a foundation to impeach Kasten later in front of Barnes's jury. Additionally, Barnes and Donaldson were in an adversarial posture because each pointed the finger at the other, so Petersen could not be deemed to have acted on Donaldson's behalf to rebut anything Kasten said.

Similarly, Donaldson had no opportunity to rebut other major submissions of Kasten's evidence, his 1991 recorded statement and his 1991 written statement. Again, Donaldson's counsel was not present when either statement was made. Saxer made clear that he has not ever talked to Kasten, and Saxer stipulated that Kasten was out of the country and unavailable. He certainly had no means to rebut any of Kasten's evidence in 1991 or now, so none of it was admissible even under the hearsay rule applicable in penalty phase proceedings.

The State then compounded the error by putting on its own investigator to bolster Kasten's credibility even though Kasten's credibility had not been attacked. The State claimed it wanted to put Moran on to establish Kasten's unavailability for the jury. Over objection, he testified that Kasten was serving his nation in what was then a war zone, the Persian Gulf, as a member of the U.S. Navy, aboard the U.S.S. George Washington. V28T1287-89. Unavailability is a legal question for the judge -- not the jury -- and serves only as a legal predicate for the court to introduce substantive testimony. See Hitchcock v. State, 578 So. 2d 685, 690 (Fla. 1990), vacated on other grounds, 505 U.S. 1215 (1992); § 90.804(1)(e), Fla. Stat. (1993). Unavailability was not even at issue in this case because the defense conceded Kasten's unavailability and so stipulated. Instead of accepting the stipulation, the judge permitted the State to introduce evidence that served no purpose other than to improperly bolster its hearsay declarant on whom it so heavily relied in 1991 and here. The judge should have accepted the stipulation and moved on to other evidence. Cf. Old Chief v. United States, 117 S. Ct. 644 (1997). The evidence served to do nothing but bolster the character of an unavailable hearsay declarant whose character as a good loyal American patriot was not in issue, a clear violation of a hornbook rule of law.[19] See generally Charles W. Ehrhardt, Florida Evidence, § 611.2 (1996 ed.). It was patently irrelevant

[19] In Kasten's deposition he described himself as a state trooper in training. V28T1291. Because the deposition also was inadmissible, the State impermissibly got to bolster Kasten's character twice over objection.

and had no probative value whatsoever to outweigh its prejudice.

Investigator Vinson testified that two witnesses, Christie Smith and a Mr. Robinson, claimed to have seen Donaldson strike Mahugh with the bat, yet Vinson himself found their stories incredible. V28T1239-40, V28T1254, V28T1257. The State did not show that Donaldson had any opportunity to rebut Smiths's and Robinson's hearsay statements. Moreover, the State should not be permitted to present such prejudicial hearsay evidence when the State itself found it lacking credibility. Such evidence is irrelevant, and the undue prejudice clearly outweighs its total lack of probative value.

The state introduced a portion of the 1991 autopsy report setting forth with excruciating detail Mahugh's injuries and symptoms. Donaldson objected to this evidence, which surely had to inflame the jurors and make them feel overly sympathetic toward the collateral crime victim, but the judge overruled the objection. V28T1229-33. Mahugh's cause of death was never in issue. Also, the State never established that Donaldson had any opportunity to rebut that report. This evidence was irrelevant, unnecessary, inflammatory, and unduly prejudicial.

The judge also erred by permitting the State to present Fleet's testimony over defense objection. V28T1365-67. Fleet prosecuted the Mahugh murder case, described the evidence already presented here, and explained, with documentary support, why he prosecuted the case the way he did. Much of his evidence was cumulative, and his explanation for why he accepted the pleas in 1991-1992 was irrelevant and unduly prejudicial in this

proceeding, as explained above.

3. Even if generally admissible, the evidence improperly became the feature of the penalty phase.

The aggravating circumstance at issue here already had been established by the contemporaneous convictions, and that fact was conceded at trial. The State put on only one witness in the penalty phase to testify for a moment or two about the crimes in this case, Wendy Kane. V28T1395-1400.[20] All the other State penalty evidence -- consuming more than 30 times as much transcript as Kane's testimony -- belabored the Mahugh incident. The collateral crimes evidence was the sole feature of this penalty phase. That evidence was not relevant at all, as argued above. But even if relevant, the court permitted the State to focus so heavily on the collateral crime that it impermissibly allowed the jury's attention to shift away from its lawful focus, rendering the jury's and judge's ultimate judgments unreliable.

Constitutional law permits the State to introduce relevant collateral crimes evidence to prove an aggravating circumstance, but with some very important limitations: The evidence must not violate the defendant's confrontation or other rights; its prejudicial effect must not outweigh its probative value; and the details of the collateral offense must not be emphasized to the

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[20] Kane's hearsay penalty testimony also was inadmissible because it was irrelevant, cumulative, unduly prejudicial, and there could have been no fair opportunity to rebut it. Mendyk v. State, 545 So. 2d 846 (Fla.), cert. denied, 493 U.S. 984 (1989); Rhodes v. State, 638 So. 2d 920, 924 (Fla.), cert. denied, 115 S. Ct. 642 (1994). That error pales in comparison to the other errors in this penalty phase, but it adds to the cumulative harm of all the penalty errors.

point where that offense becomes a feature of the penalty phase. The accused's rights are most seriously endangered when the victim of a collateral crime testifies for the State to prove an aggravating circumstance. Finney v. State, 660 So. 2d 674, 683 (Fla. 1995), cert. denied, 116 S. Ct. 823 (1996); see Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996) (reversible error to make feature of penalty phase pedophilia and sex crimes committed upon the juvenile sister of the murder victim); Wuornos v. State, 676 So. 2d 966, 971 (Fla. 1995) (error to prove CCP aggravator relying entirely on collateral crime evidence), cert. denied, 117 S. Ct. 395 (1996); Duncan v. State, 619 So. 2d 279, 282 (Fla.) (error to introduce photo of collateral murder victim when collateral crime had been proved through judgment and officer's testimony), cert. denied, 510 U.S. 969 (1993); Rhodes v. State, 547 So. 2d 1201, 1204-05 (Fla. 1989) (error to introduce statement of collateral crimes victim when crimes proved through judgment and officer's testimony); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (spouse of collateral crime victim should not have been permitted to testify to prove prior felony conviction), cert. denied, 501 U.S. 1259 (1991). Cf. Old Chief v. United States, 117 S. Ct. 644 (1997) (because of undue prejudice of evidence underlying prior collateral conviction, courts should accept stipulation that conviction existed rather than introduce details of conviction).

Finney made a special point to limit the State's use of victims of collateral crimes to prove aggravating circumstances:

[W]e take this opportunity to point out that victims of

> prior violent felonies should be used to place the facts of prior convictions before the jury with caution. Cf. Rhodes, 547 So. 2d at 1204-05 (error to present taped statement of victim of prior violent felony to jury, where introduction of tape violated defendant's confrontation rights and the testimony was highly prejudicial). This is particularly true when there is a less prejudicial way to present the circumstances to the jury. Cf. Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990) (surviving spouse of victim of prior violent felony should not have been permitted to testify concerning facts of prior offense during penalty phase of capital trial where testimony was not essential to proof of prior felony conviction), cert. denied, 501 U.S. 1259, 111 S. Ct. 2910, 115 L. Ed. 2d 1073 (1991). Caution must be used because of the potential that the jury will unduly focus on the prior conviction if the underlying facts are presented by the victim of that offense.
>
> Testimony concerning the circumstances that resulted in a prior conviction is allowed to assist the jury in evaluating the defendant's character and the weight to be given the prior conviction so that the jury can make an informed decision as to the appropriate sentence. Rhodes, 547 So. 2d at 1204. However, the collateral offense need not be "retried" before the capital jury, in order to accomplish that goal. Evidence that may have been properly admitted during the trial of the violent felony may be unduly prejudicial if admitted to prove the prior conviction aggravating factor during a capital trial. This is particularly true where highly prejudicial evidence is unnecessary, or where the evidence is likely to cause the jury to feel overly sympathetic towards the prior victim.

Finney, 660 So. 2d at 683-84.

Even if the State had the authority to put on some evidence of the prior crime, the State went way beyond the line drawn in Finney, presenting five witnesses in court including three investigators and a prosecutor; the 1991 discovery deposition of James Kasten; the 1991 tape-recorded statement Kasten gave to the authorities; Kasten's 1991 handwritten statement; Donaldson's 1991 tape-recorded statement; 1991 photographs of Donaldson and

Barnes; a portion of the 1991 autopsy report detailing Mahugh's injuries and symptoms; and the 1991 bill of information charging Donaldson with a greater crime than that to which he was convicted in the Mahugh case.

B. <u>The whole weighing process was skewed by argument and findings that double-counted this one circumstance.</u>

In arguing the aggravation to the jurors and judge, the State repeatedly misled the cosentencers by arguing that the contemporaneous violent felonies and the prior violent felony involving Mahugh constituted separate aggravating circumstances, enumerating each and urging the jurors to independently find and weigh each against Donaldson. The prosecutor told the jury the aggravating circumstance "applies two-fold in this case," V30T1669; as to each murder count the Mahugh incident "is also an aggravating circumstance," V30T1670; the State had proved "two aggravating circumstances as to each count of murder so far" based solely on the contemporaneous crimes and the Mahugh crime, V30T1672; "there are five aggravating circumstances, the murder of the other child; the murder of Paul Mahugh; heinous, atrocious and cruel; cold, calculated and premeditated; and during the course of a kidnapping," V30T1676; and jurors should weigh in aggravation "five [aggravators] as to each murder," V30T1692. The jury was then instructed as to the two, both under a single numerical heading but each constituting a separate paragraph. V14R2673-74, V30T1715-16.

In its sentencing memorandum, the State again argued five separate enumerated aggravating circumstances as to each murder,

twice counting the two episodes as two discrete aggravators, one for the previous conviction of a capital offense, and the other for the previous conviction of a violent felony. As to Head:

1. The defendant was previously convicted of another capital offense, to wit: the first degree murder of Lawanda Latisha Campbell.

2. The defendant was previously convicted of a felony involving the use or threat of use of violence to some person, to wit: the defendant's January 8, 1992 conviction of Accessory after the Fact to Second Degree Murder.

V14R2691. He did the same as to Campbell:

1. The defendant was previously convicted of another capital offense, to wit: the first degree murder of Donnta Lamar Head.

2. The defendant was previously convicted of a felony involving the use or threat of use of violence to some person, to wit: the defendant's January 8, 1992, conviction of Accessory after the Fact to Second Degree Murder.

V14R2695. The State perpetuated and reinforced its error at the May 22 hearing, again arguing the judge should find "five aggravating circumstances" proved as to each count, and again enumerating this one factor as two. V15R2993.

Finally, the judge followed the State's unlawful guidance and made precisely the same mistake in sentencing. The judge enumerated five separate aggravating circumstances, twice counting and weighing this single circumstance as two separate enumerated aggravating circumstances:

1. The Defendant was previously convicted of another capital offense. Since this case involves the simultaneous murder of two teen-age children, the Defendant having been found guilty of first degree murder in both Counts I and II, this aggravating factor is uncontroverted as it applies to each count individually. This aggravating factor has been

proved beyond a reasonable doubt as to each count.

2. The Defendant was previously convicted of a felony involving the use or threat of violence to some person, to-wit: the Defendant's January 8, 1992, conviction of Accessory after the Fact to Second Degree Murder. While a conviction of Accessory After the Fact to Second Degree Murder is not, standing alone, sufficient to satisfy the requirements of this aggravating factor, the evidence introduced by the State during the penalty phase proceeding proved beyond a reasonable doubt that the Defendant's conviction for this offense most certainly did involve the use or threat of violence to the person of Paul Mahugh. The evidence presented indicated that the Defendant, while riding his bicycle, apparently heard what he thought to be a racial slur from a group of white males standing in the parking lot of a bowling alley. The Defendant went home, recruited several of his friends, collected his bat which he referred to as "bam-bam", and returned with his friends and the baseball bat to the parking lot. The Defendant's own testimony indicates that his intention in taking the baseball bat to the parking lot was to threaten the group of young white males for making what he perceived to be a racial slur. Upon arriving at the parking lot, the Defendant and his friends approached the group of white males and the Defendant participated in the fatal attack on Paul Mahugh by striking the victim with his fists and holding him while another co-defendant struck the victim with the baseball bat, resulting in the death of the victim. Thereafter, testimony was uncontroverted that the Defendant bragged to his friends back at his residence about "smashing that cracker." While the Defendant was allowed to negotiate a plea for a lesser offense, it has been proven beyond a reasonable doubt that the Defendant has been previously convicted of a felony involving the use or threat of violence to some person.

V15R2751, V14R2790, V16R3006-07.

As argued above, the Mahugh evidence constituted nonstatutory aggravation. But even if this Court finds otherwise, the jury and judge impermissibly gave it undue consideration. Just as two aggravating circumstances cannot be based on the same aspect of the crime, e.g., Provence v. State,

337 So. 2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), a single aggravating circumstance cannot be found and weighed more than once for each murder. Here, the single aggravator was applied four times, twice to Head's murder and twice to Campbell's murder. The jurors and the judge are free to attribute less or more weight to a single factor based on the facts of a case, but neither jurors nor the judge are free to find, count and weigh two aggravating circumstances when the law provides for only one. The prosecutor's arguments, the jury's recommendation, and the judge's findings all reflect that the cosentencers were misled, and their findings and cumulative weighing were unlawfully distorted as a direct consequence.

The prosecutor's misleading and erroneous argument to both the judge and jury was the kind of unlawful argument this Court has prohibited. For example, in Garcia v. State, 622 So. 2d 1325 (Fla. 1993), the prosecutor erroneously argued a prejudicial fact that did not exist. Here, the prosecutor urged the cosentencers to find an additional, independent, enumerated aggravating circumstance that did not exist as a separate circumstance. Even though the argument was not objected to itself on this ground, it constitutes fundamental error going to the heart of the weighing process. The error also combines with all the other errors made with respect to the Mahugh incident.

The judge may have been able to lessen the jury's problem a little bit by giving a doubling instruction, one the judge too should have followed, but he did not. Before trial, Donaldson asked for a doubling instruction and furnished a memorandum of

law in support that cited Provence. V14R2647, V14R2627-28. The judge denied the request for a doubling instruction at the charge conference "because there is no case authority cited for the requested instruction," V30T1640, and because the State agreed not to argue both aggravated child abuse and kidnapping in support of the murder committed during an enumerated felony aggravator, V30T1639-41. Yet Provence had been cited in a proper timely request for the instruction, so the instruction should have been given. Castro v. State, 597 So. 2d 259, 261 (Fla. 1992) ("A limiting instruction properly advises the jury that should it find both aggravating factors present, it must consider the two factors as one, and thus the instruction should have been given."). The fact that illegal doubling actually did take place bears out that error all too clearly.

Combined with the prosecutor's misleading argument and the judge's refusal to instruct the jury not to double, the jury was given precisely the kind of open-ended discretion condemned under the eighth amendment, Maynard v. Cartwright, 486 U.S. 356 (1988), and under article I, section 17, of the Florida Constitution. Maynard said jurors must be adequately and properly given guidance as to "what they must find to impose the death penalty," and when they are not, jurors and the appellate courts are left to suffer "the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." 486 U.S. at 361-62. The judge's findings also fell outside the limits of the constitution because the judge exercised unbridled discretion in unlawfully counting and weighing an aggravating circumstance.

The prejudice in this case is paramount, for the prosecutor put great emphasis on the prior violent felony as a separate aggravator throughout every stage of the penalty phase. Granting a new penalty phase before a jury is the only adequate remedy.

IV: WHETHER THE COURT ERRONEOUSLY PERMITTED THE STATE TO INTRODUCE THE HEARSAY, DISCOVERY DEPOSITION TESTIMONY OF CISNEROS TO PROVE SYKOSKY WAS THE TRIGGERMAN, DESPITE THE FACT THAT BOTH PARTIES STIPULATED SYKOSKY WAS THE TRIGGERMAN, THE DEFENSE HAD NO ADEQUATE OPPORTUNITY TO REBUT THE DEPOSITION, AND THE STATE OPENLY KNEW THE DEPOSITION HAD BEEN PERJURED.

The Court admitted into evidence the perjured hearsay discovery deposition of a non-testifying codefendant, Cisneros, for the judge's consideration, absent a fair opportunity to rebut it. That decision, made over Donaldson's objection, violated Donaldson's state and federal constitutional rights to due process, confrontation, a fair sentencing proceeding, and his protection against cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

On February 8, 1996, Cisneros entered a plea agreement in which he agreed to cooperate with prosecutors. V11R2089, D. Ex. AA. A week later, on February 15, counsel for Donaldson and Sykosky took the deposition of Cisneros, who was himself represented by counsel. V12R2254-2340. In that deposition, Cisneros gave some evidence so seriously conflicting with his prior statements that the prosecutor said Cisneros lied and threatened to revoke the plea agreement. V12R2332-34. At the close of the penalty proceedings before the jury April 26, the State, without objection, introduced into evidence its motion to revoke Cisneros's plea agreement because he had lied in the

deposition, particularly with respect to Sykosky's role and actions. V30T1635-37. Then in the May 22 hearing, the State offered into evidence both the very deposition it knew had been perjured along with Cisneros's sworn investigative statement. V15R2984-85. Donaldson objected. Counsel said he had no fair opportunity to rebut them. Sykosky's status was now open because he may no longer be cloaked by a plea agreement and is subject to prosecution and invocation of his fifth amendment rights and could not be subpoenaed as a witness. V15R2985-87. The State argued the statements should be admitted to prove that Sykosky was the triggerman to rebut nonstatutory mitigation about uncertainty of the identity of the triggerman. V15R2988-89. However, Donaldson's counsel stipulated that Sykosky was the triggerman, making the deposition irrelevant and cumulative. Even the judge, who presided over both this trial and Sykosky's trial, concurred that all the evidence -- except for Sykosky's own testimony -- proved Sykosky was the triggerman, so the identity of the triggerman was not an issue. V15R2989. The State offered to withdraw the investigative statement if the defense agreed to admit the deposition, but Donaldson refused. V15R2989-90. The Court accepted the stipulation of the parties that Sykosky was the triggerman; found the offer to introduce the investigative statement had been rescinded; but admitted the deposition over objection by finding defense counsel "had an opportunity at that time [at the Feb. 15 deposition] to examine and cross-examine Mr. Cisneros." V15R2990.

As demonstrated above, rules of relevancy apply in capital

proceedings, as do requirements that Donaldson be given a fair and meaningful opportunity to rebut hearsay evidence. See, e.g., Hitchcock v. State, 673 So. 2d 859, 861 (Fla. 1996); Rhodes v. State, 638 So. 2d 920, 924 (Fla. 1994); Duncan v. State, 619 So. 2d 279, 282 (Fla.), cert. denied, 510 U.S. 969 (1993). Cisneros's deposition failed these standards.

This deposition was not offered to prove any fact in issue. Everybody in this case, including the judge, agreed throughout the entire proceedings that Sykosky was the triggerman. A stipulation to that effect was offered and accepted, and no other substantive evidence should have been introduced. Cf. Old Chief v. United States, 117 S. Ct. 644 (1997) (court should accept stipulation of material fact of prior conviction and should not introduce other substantive evidence to prove that fact). Additionally, the deposition had no probative value whatsoever because the offering party said it contained perjured testimony. Therefore it had no indicia of reliability. This is especially true here where the very fact for which the State offered the testimony -- proof of Sykosky's actions as they related to Donaldson -- was what the State said Cisneros lied about.

The discovery deposition also was inadmissible as substantive evidence because it did not provide Donaldson a fair, meaningful opportunity to rebut Cisneros's testimony. For one thing, as discussed above, this Court recently said in State v. Green, 667 So. 2d 756 (Fla. 1995), that discovery depositions are unique and perform a particular function that is disserved by allowing a party to introduce the deposition as substantive proof

of any fact. Here we have a deposition for which lawyers representing Donaldson and Sykosky conducted direct examination. They were preparing their defenses by gathering ammunition to impeach Cisneros in cross-examination at trial, necessarily saving their confrontation for proceedings before the jury. Rebuttal, confrontation, and cross-examination would have been wholly inappropriate in the discovery deposition, especially by the parties doing direct examination. The only rebuttal that took place was by the State when the prosecutor cross-examined Cisneros, accused him of lying, and threatened to rescind the plea offer. Donaldson did not have a "fair opportunity to rebut" Cisneros's hearsay under theses circumstances, either within the meaning of section 921.141(1), or the confrontation clauses.

Also, as counsel stated at trial, counsel could not summon Cisneros to testify to amply rebut his deposition testimony because he was represented by counsel and, in the view of the prosecutor, was subject to prosecution and therefore cloaked by his constitutional protection against self-incrimination.

This violation was made even more egregious because the prosecutor defied settled ethical limitations on his authority by offering as evidence what he knew to be perjured testimony. Rule 4-3.3(a)(4) of the Rules Regulating the Florida Bar prohibits a prosecutor from offering testimony that the lawyer knows to be

false.[21] Likewise, the American Bar Association's standards for prosecutors explicitly prohibits a prosecutor from knowingly offering testimony in any form that the prosecutor knows to be false. ABA Std. Crim. J. 3-5.6(a) (3d ed. 1993).[22] The trial judge's ruling perpetuated and condoned this ethical lapse.

The harm of this error applies only to the judge, and therefore a new sentencing before the judge would be appropriate. However, this error, combined with other penalty errors, require a new sentencing proceeding before a jury.

V: WHETHER THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS OR CRUEL WAS PROPERLY INSTRUCTED AND FOUND.

The trial court erred by giving constitutionally deficient instructions for the aggravating circumstance of heinous, atrocious, or cruel, by making erroneous findings, and by concluding the aggravator was proved despite reasonable doubts in the evidence. These errors denied Donaldson a fair sentencing proceedings and disposition in violation of his state and federal

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[21] Rule Regulating the Florida Bar 4-3.3(a)(4) provides that a lawyer "shall not knowingly":

> permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

[22] ABA Standard of Criminal Justice 3-5.6(a)(3d ed. 1993), governing the Prosecutorial Function, provides:

> (a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

constitutional rights to due process, equal protection, and his protection against cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

A. The statute and instruction are vague and overbroad.

The instruction in this case said:

> The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

V14R2674, see V30T1716. This instruction and the statute on which it is based are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Espinosa v. Florida, 505 U.S. 112 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). This instruction represents this Court's quick fix after Espinosa, adding language taken from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), but the instruction still fails to give adequate guidance and still focuses on the meaningless definitions condemned in Espinosa, Shell, and Maynard. Also, "conscienceless," "pitiless," and "unnecessarily torturous" are subject to overbroad interpretation. A jury easily could conclude any non-instantaneous death qualifies. See also Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983)

("conscienceless" or "pitiless" allows jury to improperly consider lack of remorse). This instruction was approved in Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 510 U.S. 834 (1993), but the Court should reconsider. Donaldson raised and lost objections pretrial, V10R1820-30, V11R2074, V15R2927, and at the charge conference, V30T1641-43, V30T1650.

B. The court erred by finding HAC as to both Head and Campbell.

Intent is a key to finding a murder was committed in an especially heinous, atrocious or cruel manner. HAC must be supported by proof beyond a reasonable doubt that the defendant both intended and actually did inflict extraordinary pain, torture or severe mental anguish, such as by causing the victims to apprehend horrible agony or imminent death for a prolonged period of time. The killer's state of mind must "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). In many cases gunshot deaths similar to this case, this Court found HAC was not proved.

For example, in Maharaj v. State, 597 So. 2d 786 (Fla. 1992), cert. denied, 506 U.S. 1072 (1993), an analogous case with far worse facts, this Court rejected HAC. Maharaj surprised Derrick Moo Young, with whom he had a financial dispute, and Derrick's son, Duane, in Duane's and Derrick's hotel room. Maharaj and Derrick argued, and Maharaj shot Derrick. Maharaj ordered both to be tied up, but Derrick lunged at Maharaj, so Maharaj shot Derrick three or four more times. Maharaj

interrogated Duane about the money while Derrick crawled out the doorway. Maharaj shot Derrick again. Duane broke free of his restraints and lunged at Maharaj. Maharaj transported Duane to another room, interrogated him a second time, and then murdered him with a single shot. Duane certainly saw what Maharaj did to his father in that room. The episode had to take a prolonged period of time. Maharaj interrogated Duane on two separate occasions before murdering him. Yet this was not HAC.

In Green v. State, 641 So. 2d 391 (Fla. 1994), cert. denied, 115 S. Ct. 1120 (1995), Green kidnapped Flynn and Hallock at their truck, robbed them, tied Flynn's hands behind his back, transported them to an orange grove, and murdered Flynn by gunshot, yet that was not enough proof of HAC. In Cannady v. State, 620 So. 2d 165 (Fla. 1993), Cannady shot his wife to death and then murdered Boisvert by shooting him several times, reloading, and shooting him some more. That was not HAC because he neither intended nor cause prolonged suffering or prolonged agony and apprehension of death. In Clark v. State, 609 So. 2d 513 (Fla. 1992), this Court rejected HAC where Clark fired a shotgun into the victim's chest from ten feet, reloaded, then fired a second shot into his mouth from two to three feet. In Santos v. State, 591 So. 2d 160 (Fla. 1991), Santos shot his 22-year-old daughter and her mother Irma as they walked along the street, but it was not HAC because the killings happened quickly and he showed no intent to cause extreme pain or suffering. In Maquiera v. State, 588 So. 2d 221 (Fla. 1991), cert. denied, 504 U.S. 918 (1992), two victims were murdered together by gunshots

fired three seconds apart, but that did not prove HAC. In Shere v. State, 579 So. 2d 86 (Fla. 1991), Shere and Demo took Snyder out "hunting" but instead killed him with multiple gunblasts. This Court rejected HAC because Shere did not intend to cause pain or suffering, and the killing itself was quick. In Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984), a single shotgun blast caused the victim to endure hours of pain and agony knowing he was facing imminent death, but the killer did not intend to cause agony, he intended to cause the death, so it was not HAC.

This Court also has held evidence the victims begged for their lives does not prove HAC absent proof that the defendant intended to torture the victims. In Bonifay v. State, 626 So. 2d 1310 (Fla. 1993), Bonifay, a hired killer, shot the victim once from outside the victim's store, crawled inside, and while the victim lay on the floor begging for his life and talking about his wife and children, Bonifay shot him twice more. But that was not HAC because Bonifay did not intend to cause a high degree of pain or torture, and absent proof beyond a reasonable doubt of such intent, "[t]he fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor." Id. at 1313. In Wickham v. State, 593 So. 2d 191 (Fla. 1991), Wickham stopped a passerby to rob him, and as the victim turned to walk away, Wickham shot him once in the back. The victim spun around, and Wickham shot him in the chest. The victim begged for his life, and Wickham shot him twice more. This Court rejected HAC because there was no showing

Wickham desired to inflict a high degree of pain or suffering. In Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988), the Court rejected HAC where the victim was shot once, begged "please don't shoot," and was shot twice more.

Likewise, assurances given to the victims that they will not be killed rebuts evidence of apprehension of death. In Robinson v. State, 574 So.2d 108 (Fla.), cert. denied, 502 U.S. 841 (1991), HAC was not proved because, as this Court found, the killer did not intend to cause the victim to apprehend death in that Robinson "assured the victim on several occasions that they did not intend to kill her and planned her release." Id. at 112.

Given the precedent, the evidence here does not prove beyond a reasonable doubt Donaldson demonstrated the intent to inflict extraordinary pain, torture or severe mental anguish. Head and Campbell voluntarily went to Cape Drive even after Donaldson told Campbell to stand on the street so he could shoot her. Obviously Campbell felt no fear from that jest. Donaldson never struck them or led them to believed they'd be killed. To the contrary, Donaldson, Wengert, and Straham assured them they would not be killed. Neither Wengert nor Straham knew why Sykosky had been summoned to the scene, and there is no evidence that Head or Campbell knew anything about the reason for Sykosky's arrival. Significantly, not even Wengert or Straham thought the two were going to be killed until the moment it happened. Had Donaldson done or said anything to cause the victims to fear impending death, certainly Straham and Wengert would not have been caught by surprise when, in a matter of seconds after Sykosky walked in,

Sykosky got the gun and opened fire five times in rapid succession, killing both immediately. We can only speculate as to whether Head or Campbell saw Sykosky get the gun or heard what Sykosky asked or was told, just as in Sykosky's trial. V21R4149-61. While Head and Campbell were in the house for two hours, they were not being interrogated the whole time. In fact, Head was given a beer, both were free to walk around, things calmed down pretty quickly, and Straham said the mood was party-like.

Other errors abound. For one thing, the judge put emphasis on the status of the victims as children, making three separate references to it in the HAC finding alone.[23] But a victim's

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[23] The judge found as to both victims:

> The murders were committed in an especially heinous, atrocious, or cruel manner. These two teenagers were kidnapped at gunpoint and held for several hours and interrogated extensively by the Defendant and his cohorts as both Lawanda Latisha Campbell and Donnta Lamar Head asked on more than one occasion if they were "going to die." The testimony indicates without question that both victims were obviously in fear of dying at the hands of the Defendant for several hours before the arrival of the triggerman, Joseph Sykosky. We will never know the amount of fear and anxiety suffered by these two children when they witnessed the arrival of Joseph Sykosky, the Defendant handing him the gun, and the Defendant directing George Wengert to go turn on the stereo and then to turn it up louder. If the victims had suspicions earlier that they might die, as evidenced by their questions, "Are we going to die", certainly they knew from the time of Mr. Sykosky's arrival that he was there for the purpose of murdering them. While the evidence is not clear which child was shot first, it is abundantly clear that one child watched as their friend was executed with full knowledge and understanding that they would be next. Even though the deaths of these victims may have been quick rather than lingering, they were subjected to hours of terror and at least minutes of excruciating and heightened anguish and fear before their death.

(continued...)

status does not support HAC. Brown. Nor were these victims especially vulnerable due to their youth. They were not average children; they were street-toughened, violent hoodlums, schemers, thieves, and armed robbers who had tried to rob Donaldson before and may have been trying to rob him again. For another thing, the judge acknowledged he could not find beyond a reasonable doubt that Head knew or understood when Sykosky opened fire that he would be next, nor could the judge make that finding as to Campbell, because the proof did not show which victim died first. But instead of not finding that fact as to either due to the uncertainty of the evidence, he found it as to both. The finding as to one victim certainly must be wrong, and without knowing which one, the finding as to each is pure speculation.

The judge's findings are erroneous and unsupported, and HAC was not established. The error in finding this significant aggravating factor requires a new jury sentencing. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993).

VI: WHETHER THE INSTRUCTIONS AND FINDING OF COLD, CALCULATED, AND PREMEDITATED WITHOUT ANY PRETENSE OF LEGAL OR MORAL JUSTIFICATION WERE ERRONEOUS.

The trial court erred by giving constitutionally deficient instructions for the CCP factor, by making erroneous findings, and by the concluding aggravator was proved despite clear evidence of a pretense or legal or moral justification, all in

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[23](...continued)
This aggravating circumstance has been proved beyond a reasonable doubt as to each count.

V14R2753, V14R2792, V16R3010-11.

violation of his rights to due process, equal protection, and his protection against cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

A. The statute and instruction are vague and over broad.

Donaldson challenged the constitutionality of the CCP statute and instructions pretrial, V10R1904-15, which the judge rejected, V11R2072. Donaldson proposed instructions, V13R2574-75, V14R2649-50, and objected to the State's instruction at the charge conference, but he was overruled, V30T1644, V30T1650.[24]

The pretense portion of the instruction fatally deviated

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[24] The court then gave the following instruction:

> The crime for which the defendent is to be sentenced was committed in a cold and calculated and premeditated manner, and without any pretense of moral or legal justification.
> "Cold" means the murder was the product of calm and cool reflection.
> "Calculated" means having a careful plan or prearranged design to commit the murder.
> As I have previously defined for you a killing is "premeditated" if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.
> However, in order for this aggravating circumstance to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.
> A "pretense of moral or legal justification" is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold and calculating nature of the murder.

V14R2674-75, see V30T1717.

from the standard instruction. The judge said the pretense must rebut "the otherwise cold and calculating nature of the murder," following Jackson v. State, 648 So. 2d 85, 89 n.8 (Fla. 1994), whereas the standard says the pretense must rebut "the otherwise cold, calculated or premeditated nature of the murder." Standard Jury Instr. in Crim. Cases (95-2), 665 So. 2d 212, 214 (Fla. 1995)(emphasis supplied). The standard obviously corrected the infirmity of Jackson; it was published long before Donaldson's trial; Donaldson asked for that element to be instructed, V13R2575, V14R2650; but the judge refused, failing to tell jurors a pretense would negate CCP entirely by rebutting heightened premeditation. The omission of an essential element of the definition of an offense or circumstance at issue in a trial, as here, is fundamental error requiring reversal. E.g., Rojas v. State, 552 So. 2d 914 (Fla. 1989) (fundamental error to omit definitions of justifiable and excusable homicide from manslaughter instruction); Anderson v. State, 276 So. 2d 17, 19 (Fla. 1973) (fundamental error to omit premeditation definition in first-degree murder charge). The same reversible error rule applies to omission of an element from an affirmative defense instruction. E.g. Motley v. State, 155 Fla. 545, 20 So. 2d 798 (Fla. 1945) (element of self defense); Dawson v. State, 597 So. 2d 924 (Fla. 1st DCA 1992) (same).

The CCP statute and instruction also were unconstitutionally vague and over broad because they give open-ended discretion to the cosentencers in direct violation of Maynard v. Cartwright, 486 U.S. 356 (1988). The premeditation element did not

adequately define premeditation as a requirement completely distinct from guilt-phase premeditation. E.g. Jackson v. State, 648 So. 2d 85 (Fla. 1994). Donaldson proposed to clarify it by saying "Certainly premeditation in a heightened degree is higher than that required to convict for first degree murder," V13R2574, V14R2649, but the judge refused. Also, the instruction defined "calculated" a careful plan or prearranged design to commit the murder, yet "premeditated" means virtually the same thing. It is confusing for different elements to have the same meaning.

B. A pretense of legal or moral justification was established.

Florida law provides that a pretense of moral or legal justification includes any colorable claim of legal or moral justification, with some evidentiary support, that rebuts the otherwise cold, calculated, or premeditated nature of the killing. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943 (1995); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). For example, in Banda, Banda and Davis plotted to kill the victim, Denmark, because Denmark had a violent nature, previously had threatened Banda, and Banda was afraid if he didn't kill Denmark, Denmark might kill him. Banda and Davis went into the woods, dug a hole, and saw potential weapons. Then Banda apparently sought out Denmark, crushed his skull, possibly strangled him, and buried him in that hole. This Court found that evidence demonstrated a pretense of legal or moral justification and rejected the CCP finding. In Christian v. State, 550 So. 2d 450 (Fla. 1989), cert. denied, 494 U.S. 1028 (1990), this Court found

a pretense in evidence that the victim had made repeated threats and attempts to attack Christian, who until the murder had not intended to harm the victim. In Cannady v. State, 427 So. 2d 723 (Fla. 1983), Cannady robbed and kidnapped the victim, took him to a remote area, and shot him. This Court nonetheless found a sufficient pretense in Cannady's statement that the victim jumped at him and he didn't mean to kill him even when the judge did not believe Cannady and his statement was uncorroborated.

The evidence here indisputably shows that Donaldson was living in a state of siege. He and his family had to be constantly surrounded by a bodyguard and guns to protect themselves from armed robbers who had made many armed assaults on Donaldson and his home where he was living with Sheila, their daughter, Sheila's other daughter, Melissa Wood, Wengert, and Cisneros. Donaldson was in a virtual war with Campbell's father, Tommy Gainer, who had tried to rob him and later hunted him down to kill him. Donaldson knew that both Campbell and Head had tried to rob him just a few days earlier by storming his hotel room with guns. Then, on the night of the murders, the same pattern of prior home invasions he had repeatedly seen emerged again when Head and Campbell showed up on his front doorstep after the phone suddenly went dead. The State's theory was that Head and Campbell were killed because they threatened Donaldson and his business. There was no evidence Donaldson ever before attempted to retaliate against Head, Campbell, or any others who sought to rob or harm him. He certainly did not lure Head or Campbell to his house. If anything, Campbell knew not to go

there after the phone conversation earlier that night. These facts demonstrate that Donaldson had a pretense of legal or moral justification similar to those in other cases. The judge did not recite any of these facts in his findings. He merely concluded the murders were committed for revenge and "cannot under any stretch of the imagination be said to have been committed under any pretense of legal or moral justification." V14R2753, V14R2791-92, V16R3010-11. The significant error in finding CCP despite the evidence of pretense requires a new jury sentencing. Padilla v. State, 618 So. 2d 165, 170 (Fla. 1993).

VII: WHETHER THE AGGRAVATOR FOR MURDER COMMITTED DURING AN ENUMERATED FELONY WAS ERRONEOUSLY FOUND.

As argued in Issue II, supra, the evidence failed to establish armed kidnapping, the only felony applicable to this aggravating circumstance. If the underlying felony is reversed, so too must the court's decision finding this aggravating circumstance. E.g. Johnson v. Mississippi, 486 U.S. 578 (1988).

VIII: WHETHER THE JUDGE ERRED BY FAILING TO ADMIT EVIDENCE OF NONSTATUTORY MITIGATION, TO INSTRUCT ON NONSTATUTORY MITIGATION, AND TO FIND AND WEIGH A SUBSTANTIAL VARIETY OF NONSTATUTORY MITIGATION.

Any fact offered in mitigation must be admitted into evidence, considered by the cosentencers, and found and weighed in favor of a life sentence if supported by the record. Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Campbell v. State, 571 So. 2d 415 (Fla. 1990); see also, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Mitigation evidence once introduced can be rejected, but

the reasons must be expressly stated in the sentencing order, must be supported by competent substantial evidence, must not misconstrue undisputed facts or misapprehend the law, and must logically support the judge's conclusion. Nibert; Campbell. The trial court failed to follow these requirements in numerous respects, thereby distorting the weighing process in violation of Florida law and Donaldson's rights to due process, equal protection, and to be free from cruel and/or unusual punishment. U.S. Const. amends. V, VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.

In the penalty phase, the court refused to permit Donaldson to testify he had turned down the State's plea offer for a life sentence, evidence relevant to support his contention that he was merely a relatively minor accomplice to Sykosky's murderous act, a statutory mitigator for which Donaldson's other testimony provided some support. V29T1575-83. The State complained that evidence of a plea offer is inadmissible, and the court agreed. That was error because if the fact bears on a mitigating circumstance, which it did, it must be presented for the jury's consideration. As the State has long argued, the rules of admissibility are somewhat relaxed in a penalty phase, especially when the accused is making his one and only attempt to explain himself to the jury. Paradoxically, the State took a somewhat contrary view earlier in the trial by offering proof of a plea agreement for a charge it had relinquished its right to pursue. Supra Issue III. The State apparently believes plea-related facts can be introduced only when they favor the State.

Donaldson specially requested instructions for accomplice murder, felony/accomplice murder, and disparate treatment of accomplices, because the jury needed guidance as to specific nonstatutory mitigators on which Donaldson relied:

> You may not consider death as a possible penalty unless you are convinced beyond a reasonable doubt either that the defendant himself did kill the victim or that the defendant intended to participate in or facilitate a murder.
> You may consider as mitigating evidence that the defendant was an accomplice in the offense for which he is to be sentenced but the homicide was committed by another person.
> You may consider as mitigating evidence the disparity of treatment to accomplices, even when the culpability of those accomplices does not equal that of the defendant. Thus, you can consider in mitigation that a coparticipant received less severe consequences.

V13R2563-70, V14R2623-24, V14R2627, V14R2638-45. The judge refused to give those instructions, V30T1645-50, giving the catch-all instead, V14R2676, V30T1718. These factors were pivotal to Donaldson's penalty defense, correctly stated the law, and were warranted. Instead, the catch-all gave jurors no guidance whatsoever. The judges's decision was erroneous because jurors must be clearly informed they are to consider any relevant mitigating evidence. See California v. Brown, 479 U.S. 538, 544 (1987)(O'Connor, J., concurring); see also Hitchcock v. Dugger, 481 U.S. 393 (1987). Donaldson recognizes this Court rejected a similar argument. Walls v. State, 641 So. 2d 381 (Fla. 1994), cert. denied, 115 S. Ct. 943 (1995). But the facts here require the requested instructions, and this Court should reconsider its prior erroneous decision.

That issue dovetails with the ambiguous and erroneous

findings the judge made with respect to the critical nonstatutory mitigator of the lesser punishment -- if punishment at all -- given to the others. The judge gave "little, if any, weight" to the lesser punishment given to Sykosky, Wengert, and Cisneros. V14R2755, V14R2794, V16R3013-15. Such ambiguity violates cases like Campbell which require judges to express with the utmost clarity their findings of mitigation, the facts on which they relied to find or reject every possible mitigating circumstance, and the weight they gave to each. Moreover, the judge found the free pass given to Straham was not even a mitigating factor at all despite the evidence of his participation in events of that night and his obstruction of justice for repeatedly lying to officials about what happened for more than a year. V14R2755-56, V14R2794-95, V16R3015. Failure to consider and find in mitigation Straham's total absolution for his conduct along with Sykosky's life sentence, Wengert's probation sentence, and Cisneros's 12-year sentence recommendation, was error.

The judge also erred by failing to find and weigh in mitigation Donaldson's "good qualities," which were "best exemplified by his moving to Georgia to take care of his invalid grandparents," V14R2757, V14R2796, V16R3017, and that he attended church regularly with his family while growing up, was very talented, and played the organ and would sing in church, V14R2757, V14R2796, V16R3017. Nothing better meets the standards of mitigation than the good, positive character of the accused, for that may well be the very core of mitigation. Lockett; e.g., Bedford v. State, 589 So. 2d 245, 253 (Fla. 1991) (good father,

husband and son, saved lives assisting paramedics, good military record are mitigating); Campbell (charitable or humanitarian deeds are nonstatutory mitigation). The judge also erred by not finding as mitigating the fact that Donaldson will never be free if sentenced to life because he is already serving life in the federal correctional system. V14R2756, V14R2795, V16R3015. See Simmons v. South Carolina, 512 U.S. 154 (1994) (parole ineligibility is mitigating and the jury must be so informed). Finally, the judge erred by not even mentioning in mitigation Donaldson's history of drug abuse, his attempted suicide; and his consumption of drugs and alcohol all day immediately preceding the murders. All of these errors, individually and collectively, denied Donaldson a fair sentencing.

IX: WHETHER THE DEATH SENTENCES WERE DISPROPORTIONATE CONSIDERING THAT DONALDSON WAS NOT THE TRIGGERMAN, THE TRIGGERMAN GOT LIFE, OTHER ACCOMPLICES GOT LENIENT TREATMENT, THE MURDERS AROSE FROM A STATE OF SIEGE MENTALITY, NUMEROUS AGGRAVATING CIRCUMSTANCES THAT SHOULD NOT HAVE BEEN FOUND, AND MUCH MITIGATION EXISTED.

Tillman v. State, 591 So. 2d 167 (Fla. 1991), and other cases, mandate proportionality review. As argued above, the HAC and CCP factors should be struck. Also as argued above, the kidnapping conviction and related aggravator should be struck. That leaves one aggravator, the prior violent/capital felony, which, again as argued above, should have been based solely on this incident and thereby is of slightly diminished weight. Terry v. State, 668 So. 2d 954 (Fla. 1996). Thus, the Court is left with one legitimate aggravating circumstance. Sentences based on one aggravator have been affirmed only when there is

little or nothing in mitigation. E.g. Thompson v. State, 647 So. 2d 824 (Fla. 1994); Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989). This case has substantial mitigation. Even if more than one aggravator is found, this Court has a long history of proportionality reversals for non-triggermen. E.g. Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Slater v. State, 316 So. 2d 539 (Fla. 1975).

This record shows that Donaldson was not the triggerman; the triggerman got life imprisonment; Wengert, who certainly was culpable in these murders, got probation for two third-degree felonies; Cisneros got a 12-year-imprisonment recommendation on his plea; Straham got a free pass altogether; Donaldson will never get out of prison; Donaldson was merely 21 when Sykosky killed Head and Campbell; Donaldson had demonstrated good character; he had a good prison record; he suffered a distressed state of mind from living with his family in a state of siege when the murders occurred; he had suffered trauma as a child and while growing up; he had the capacity for hard work; he had a history of drug abuse; he had attempted suicide; and he had consumed drugs and alcohol at the time of the murders. On the totality of these circumstances, the death sentences are disproportionate punishment.

X: WHETHER THE NONCAPITAL SENTENCES DEPARTED FROM THE GUIDELINES ABSENT CONTEMPORANEOUS WRITTEN REASONS.

The circuit judge imposed sentence on May 28, 1996, V16R3004-19, entering a written judgment and sentence pursuant to

his oral pronouncement, V14R2725-49, V14R2765-88. The judge later entered into the record an amended written judgment and sentence form executed on June 26, 1996, nunc pro tunc May 28, 1996. V15R2815-36. No guidelines score sheets or departure reasons were attached to the original or amended sentence forms. The judge subsequently entered into the record a second amended judgment and sentence form executed on July 16, 1996, nunc pro tunc May 28, 1996, this time attaching a guidelines score sheet. V15R2837-61. For purposes of sentencing on the four noncapital offenses, the score sheet scored Donaldson at 288.1 points, which, when multiplied by 1.25, equaled a maximum guidelines sentence of 325.1 months' state imprisonment, V15R2859-60, the equivalent of 27.09 years. No departure reasons were entered in the space provided, V15R2961, or at any time thereafter. Nonetheless, the judge departed from the guidelines, imposing life sentences on Counts III and IV, and thirty (30)-year sentences on Counts V and VI. V14R2725-49, V14R2765-88, V15R2815-36, V15R2837-61, V16R3004-19. If the noncapital offenses are affirmed, the noncapital sentences should be vacated and a new sentencing ordered at which time only guidelines sentences may be imposed. Gibson v. State, 661 So. 2d 288, 293 (Fla. 1995); Owens v. State, 598 So. 2d 64 (Fla. 1992).

CONCLUSION

For the reasons stated above, this Court should reverse and order a judgment of acquittal on the charged offenses. Alternatively, this Court should remand for a new trial. Alternatively, this Court should vacate the death sentences and remand for

imposition of life sentences. Alternatively, this cause should be remanded for new penalty proceedings before a new jury panel.

CERTIFICATE OF SERVICE

I certify that a copy of this initial brief of appellant has been furnished by delivery to Richard Martell, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Charles Donaldson, on this 14th day of April, 1997.

Respectfully submitted,

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